SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

THE GEORGE WASHINGTON UNIVERSITY,
Petitioner,

v.

THE DISTRICT OF COLUMBIA, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 16, 2003

25 pp

QUESTIONS PRESENTED

I. Once a court has determined that a university has a constitutionally protected "property interest" with which local regulators have interfered, may the court uphold the regulation in a substantive due process challenge if the regulators articulated a facially illegitimate government purpose?

II. If a regulation that interferes with a university's property interest also interferes with the university's self-governance so as to implicate issues of academic freedom, should the regulation be subject to a heightened standard of constitutional review?

III. Can a land use regulation that is openly discriminatory against a non-suspect class of persons withstand equal protection scrutiny if its stated purpose is not designed to further a legitimate government interest and in fact is explicitly barred by the local jurisdiction's "bedrock policy" and law?

PARTIES TO THE PROCEEDING

I. Petitioner

The George Washington University

II. Respondents

The District of Columbia

Mayor, Anthony Williams

District of Columbia Board of Zoning Adjustment ("BZA")

BZA Chair, Geoffrey Griffis

BZA Members Anne Renshaw, David Levy and Carol Mitten

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PETITION FOR A WRIT OF CERTIORARI

The George Washington University hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. 1a-20a) is reported at 318 F.3d 203 (D.C. Cir. 2003).

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2003. The court of appeals denied a timely petition for rehearing on March 18, 2003. (App. 160a-161a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The constitutional provision, statutes and regulations involved are the Fifth Amendment of the United States Constitution, 42 U.S.C. § 1983, the District of Columbia Human Rights Act, D.C. Code § 2-1401.01 *et seq.*, and D.C. Code § 6-641.02 and regulations promulgated thereunder. They are reproduced in Appendix G. (App. 162a-182a.)

STATEMENT OF THE CASE

Introduction. The court of appeals upheld a Board of Zoning Adjustment Order ("BZA Order") crafted with the expressed goal of reducing the number of student residents in a neighborhood that the BZA sought to preserve for "non-students." (App. 11a (describing the BZA's purpose as, "to limit or reduce the number of students in the area").) Despite the facial illegitimacy of that goal, the District of Columbia Circuit reversed the district court's order striking down the BZA action as a violation of GW's substantive due process rights. The court of appeals applied an analytical framework

different from that articulated by other circuits and inconsistent with guidance from this Court requiring government action to serve a "legitimate government interest[]." *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). The court of appeals also refused to apply equal protection principles because the case did not involve a suspect class.

The federal courts have understandably been loath to "sit as a zoning board of appeals," *see Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting), and accordingly favor deferential review of constitutional challenges to local zoning action. Without any concrete statement from this Court as to the proper criteria applicable to substantive due process challenges to quasi-legislative action,[1] in this case, the court of appeals went too far. Its forgiving opinion sets a dangerous standard that opens the door to intentionally discriminatory land use regulation that targets classes of persons rather than property. By ignoring the basic illegitimacy of the governmental interest served by the regulation before it, the court endorsed a standard that authorizes the federal courts to overlook virtually any violation of state law and policy by local regulators, provided that a minimum rationality can be ascribed to the means devised to achieve even illegitimate ends. This Court now has the opportunity to provide acutely-needed clarification in this difficult area.[2]

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[1] *Cf. County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (setting standard for "abusive *executive* action"); and *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, __ U.S. __, 123 S. Ct. 1389, 1396 (2003) (evaluating substantive due process challenge to ministerial act by applying standard applicable to executive action).

[2] *See* Stewart M. Weiner, Comment, *Substantive Due Process in the Twilight Zone: Protecting Property Interests From Arbitrary Land Use Decisions*, 69 TEMP. L. REV. 1467 (1996).

Relevant Regulatory Framework. GW has been located in the "Foggy Bottom" area of the District of Columbia since 1912. The University's Foggy Bottom campus is located on 43 urban acres. Not one square inch of the campus is zoned for single-family, or any low-density residential use. It is all zoned for either commercial, special purpose (a mix of high-density residential and commercial) or high-density residential use.

Since the 1970's, GW has been subject to the city's "campus plan" zoning regulations. Under that scheme, each university in the District must periodically seek BZA approval in concept of a "campus plan" that describes the university's plans for development over the succeeding years. *See Levy v. D.C. Bd. of Zoning Adjustment,* 570 A.2d 739 (D.C. 1990). It is GW's plan for the period from 2000-2009, and the BZA's Order conditioning approval of that plan, that are at issue in this case. While the BZA has some latitude in approving such campus plans based on record evidence, the court of appeals concluded that District law sufficiently constrained that discretion such that GW has a constitutionally protected property interest in its right to use its campus for university purposes. (App. 7a-10a.)

Pursuant to campus plan approvals, the BZA has historically imposed appropriate requirements on a university's proposed expansion of campus boundaries, including traffic management, density restrictions, noise limitations and other planning measures aimed at legitimate land use concerns. *See, e.g., Spring Valley Wesley Heights Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, 644 A.2d 434 (D.C. 1[illegible]); *Citizens Ass'n of Georgetown v. D.C. Bd. of Zoning Adjustment*, 403 A.2d 737 (D.C. 1979). GW's previous approved campus plan, effective from 1985-2000, contained a density limitation (with which GW has constantly complied), and a stated expectation that overall enrollment would stabilize at 20,000 by the year 2000. *See* BZA Order No. 14455 at 7. Although the court of appeals noted that

GW's "sharp expansion of its enrollment in the 1990's made the issue [of the BZA's concerns in 2001 about students in Foggy Bottom] more acute" (App. 4a), it apparently overlooked the fact, acknowledged by the BZA in its Order, that GW's overall enrollment has remained relatively constant since 1985 at between 17,000 and 18,000. (App. 79a.)[3]

The District of Columbia Human Rights Act ("DCHRA") statutorily protects from discrimination a number of classes of persons. One of those protected classes is students. The DCHRA unambiguously prohibits discrimination in housing on the basis of matriculation. *See* D.C. Code § 2-1401.01. (App. 163a.) A 1994 Mayoral Order stated that the DCHRA is "a bedrock statement of the public Policy of the District of Columbia." (Mayor's Order No. 94-132, 41 D.C. Reg. 3252 (1994).) (App. 179a-181a.)

The BZA Orders. On December 28, 1999, GW filed an application for BZA approval of its 2000 Campus Plan. During the hearings on the Campus Plan, representatives of community groups testified generally about their desire to preserve the residential housing stock in Foggy Bottom for non-students. (*E.g.*, D.C. Cir. Joint App. ("Jt. App.") 64-65.) They complained that University residence halls had replaced a number of "residential" buildings, including, notably, several failing hotels (suggesting that residence halls were somehow not residential and students somehow not residents). They complained that the residence of large numbers of students in the neighborhood was purportedly incompatible with a "viable, permanent residential neighborhood, because student residents displace permanent residents, deplete available housing stock, erode the fabric of the neighborhood, and contribute little to the local tax base." (App. 136a.) They also complained that "student renters . . . [had] flooded the private market" (App. 137a) and that

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[3] GW's undergraduate enrollment has increased somewhat while its graduate enrollment has fallen. (App. 79a.)

students were living in increasing numbers in apartment buildings, though they could present no concrete data. (*E.g.*, Jt. App. 141 (admitting that there were no "hard numbers" to back up residents' estimates).)

The Director of the District's Office of Planning ("OP") ultimately supported the neighbors' position that the number of students living in Foggy Bottom was a problem, not because of their behavior (there was virtually no evidence of any misbehavior), but simply because of the sheer number of students (as compared to non-students) who live there. (Jt. App. 369.) Significantly, he testified that GW had satisfied all of the criteria for granting GW's Campus Plan application *except for* number of students. (Jt. App. 154 (also admitting that noise and traffic considerations were adequately dealt with by the University).) OP's primary concern was that the neighborhood was reaching the "tipping point" beyond which it would become a neighborhood of students. (App. 84a; 132a-133a.) OP proposed a "baseline" approach under which the BZA would order that no more than a fixed number of GW students could live in Foggy Bottom. (App. 133a-134a.) The District's Office of Corporation Counsel, however, explained that the DCHRA precluded discrimination against students. (Jt. App. 164-73.) It concluded that "there appears to be a substantial risk that a court could find the OP proposal to be unlawful under one or more of the provisions of the Human Rights Act." (Jt. App. 172.) OP ultimately conceded, due largely to the DCHRA issue, that its "preferred" baseline approach would "'introduce too much complexity' in the proceeding." (App. 134a.)

On March 29, 2001, the BZA entered its Original Order, which predicated approval of GW's Campus Plan on numerous conditions including "Condition 9", which imposed a retroactive freeze on undergraduate enrollment (despite the fact that the admissions process was underway and the precise enrollment was unknown – and unknowable – by the BZA) and a moratorium on non-housing development. (App. 124a-

159a.) The Order reiterated the expressed goals of reducing the number of students off campus, but implemented requirements to achieve its goals in an indirect manner, by requiring GW to house a fixed percentage of its students on campus, which the BZA knew that GW could not immediately do. Due to the dire impact, GW initiated the action below. The district court enjoined enforcement of Condition 9 on substantive due process grounds, holding that Condition 9 "part[ook] of the essence of 'arbitrary and capricious.'" (App. 72a.)

The BZA held various supplemental administrative proceedings at which it heard evidence of the University's expedited plans to build 1100 new beds on campus, and its acquisition of properties just outside its campus boundaries to house 709 more undergraduates. (App. 81a-82a.)[4] The BZA then issued a Remand Order on December 21, 2001 (App. 77a-123a), explicitly adopting the Original Order virtually in its entirety, revising only Condition 9 (addressing the housing of GW's undergraduate students and the construction of buildings on campus for non-residential use) and two other Conditions not relevant here. (App. 116a-119a.) Revised Condition 9 requires the University to provide on-campus housing for a minimum of 5600 full-time undergraduates (70% of 8000), plus one bed for every undergraduate enrolled beyond 8000. This requirement applies (i) regardless whether any such students would choose on-campus housing, (ii) despite the ample supply of University housing (more than 5500 beds on and off campus) already in existence, and (iii) regardless whether GW's undergraduate enrollment were to fall below 8000. Thus, based on GW's Fall 2001 enrollment of 8058, given that only 4120 of its total 5500-plus beds were within the campus boundaries, the Remand Order would have

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[4] All of the properties that the University acquired outside its campus boundaries are in high-density residential or special purpose zones, which permit "dormitory" use as a matter of right. *See* 11 DCMR § 330.5(g); § 350.4(a); and § 501.1.

required GW to secure more than 1500 additional beds by September 2002 – provided its enrollment just remained flat into the Fall.

The housing requirement has two phases. First, recognizing, as it had to, that the University could not develop 1500-plus new on-campus beds overnight, from September 2002 until August 2006, the BZA permitted GW to count toward its required 5600-plus beds not only on-campus beds, but also off-campus beds that the BZA assumed that GW could acquire in short order, provided that they are located *outside* Foggy Bottom/West End altogether.[5] Second, after August 2006, only on-campus housing may be counted. Significantly, at no time did the BZA permit GW to count the existing roughly 1400 beds it already had in properties adjacent to its campus that were permitted by-right under the relevant zoning regulations. (Jt. App. 295.) For any period during which GW is not in compliance with the on-campus housing requirement, there is a moratorium on the construction of any on-campus non-residential facilities. (App. 89a; 118a-119a.)

The Remand Order also retained Condition 10, which provides that the University house all of its freshmen and sophomores on campus, despite the fact that the University had recently spent nearly $25 million on the acquisition and refurbishment of a property in Foggy Bottom just outside its campus boundaries, specifically configuring it for freshmen. (Jt. App. 295, 300.) This property, the former Howard Johnson Hotel, abuts the entrance ramp for Interstate 66, and was recently affirmed by the District of Columbia Court of Appeals as being a by-right "dormitory" use in that zone. *See*

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[5] Remarkably, in its haste to rid Foggy Bottom of student residents, at no time did the BZA consider the effect of transporting 1500-plus undergraduates to and from Foggy Bottom each day on legitimate land use considerations such as traffic, parking or congestion.

Watergate West, Inc. v. D.C. Bd. of Zoning Adjustment, 815 A.2d 762 (D.C. 2003).

Finally, the BZA adopted an extraordinary punitive provision, Condition 9(f), which provided that, if any portion of Condition 9 "is declared void for any reason by any court in any proceeding, no application for a special exception will be processed and no permit to construct or occupy buildings for non-residential use on campus may be issued until and unless the Board thereafter orders otherwise." (App. 119a.) This new provision threatened not only to punish GW for seeking and obtaining judicial relief with respect to Condition 9's revised effects, but also to trump any injunction against the Remand Order.

Though it was apparently not the court of appeals' goal to do so, its own mathematical analysis demonstrated clearly and concisely that the BZA order renders by-right dormitories in Foggy Bottom redundant. The court correctly noted that the Order guarantees that 5600 of 8000 undergraduates will be housed on campus or outside of Foggy Bottom; that 1250 are not suited for dormitory life (married, commuters or the like), and that this leaves 1150 who may live off campus in Foggy Bottom. (App. 13a.) Given that GW already controls 1400-plus beds off campus in Foggy Bottom, it seems inescapable that hundreds of them would be unusable for their intended purpose by the court's own calculus. The BZA well understood both that it could not lawfully prevent GW from using such properties for matter-of-right residence halls (App. 106a); and that the effect of its on-campus housing requirement was to make those off-campus residence halls redundant. (App. 112a ("If the University finds it infeasible to continue their current use, nothing in the record suggests an impediment to their return to pre-existing uses or to long-term [non-student] residential use.").)

The requirement that the University add a new bed for every new undergraduate enrolled compounded Condition 9's adverse impact on the University's operations. It also carried

implications for admissions and other decisions at the core of the University's mission. Requiring additional housing for every additional student would inevitably push the University to prefer students who would accept – and could afford – University housing. It would cost the University far more to admit students who are married, have children or disabilities, or some other attribute that makes on-campus housing infeasible.

In light of the dire, immediate impact of the Remand Order, on April 12, 2002, the district court granted GW's motion for summary judgment, striking down Condition 9's housing requirements and Condition 10 (which required the University to house freshmen and sophomores on campus). The court ruled that the BZA's mandate that the University construct new beds on campus when it had existing capacity just off campus in by-right dormitories was so arbitrary and capricious as to violate the University's right to substantive due process:

> ...[T]he Order arbitrarily forces the University before August 2002 to go to great effort and expense to provide additional housing for 1500 undergraduates, for most of whom it has already lawfully provided housing. . . . . Thus if Condition 9(a)-(c) remains in force, the University faces a choice of damaging evils: it must either on short notice buy or rent additional housing outside of Foggy Bottom for 1500 students' beds, leaving vacant either its residential dormitory space in Foggy Bottom or its newly acquired housing, in order to comply with the Final Order, or abandon its program for on-campus construction of non-residential space until its existing plans to construct additional dormitory space on-campus come to fruition and eventually enable it to come into compliance with the Final Order.

(App. 41a-42a.) The Court also ruled that Condition 9(f), which provided that the BZA could effectively trump any effort to have any aspect of the Order struck down, was

unconstitutional and a violation of the separation of powers. The district court noted in its opinion that while the record before the BZA focused on the perception that student residents were somehow making Foggy Bottom seem "less residential," it contained "no foundation, on the basis of student misconduct or noise-related nuisance" for the BZA's actions. (App. 49a.)

The Court of Appeals' Opinion. The court of appeals disagreed with the district court's analysis. While it undertook a comprehensive analysis of the property interest at issue, and ultimately held that GW did have a protected property interest under the relevant regulations, its analysis fell short thereafter. The court acknowledged that "it seems inescapable that the District is drawing a distinction based on student status." (App. 10a-11a.). The court identified what it believed to be the "implicit basis for the Board's distinction of students from others – namely, that on average they pose a risk of behavior different from that generally preferred by non-student residents" (App. 11a), even though there was no such evidence anywhere in the record. It then characterized the minimal rationality it imputed to the BZA's action: "Given the District's concern that an excess of students in the Foggy Bottom area is negatively affecting the character of the neighborhood, it cannot be irrational for the District to adopt rules likely to limit or reduce the number of students in the area." (App. 13a.)[6]

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[6] The BZA repeatedly attempted to justify its action by noting that the neighborhood was at the "tipping point" of becoming a "university neighborhood" if more students took up residence there. (App. 84a; 132a-133a.) It is unfortunately easy to imagine the other classes of residents whose presence in sufficiently large numbers might cause some neighborhood constituency to become concerned about "tipping points" and the "character of the neighborhood." It is thus important that constitutional boundaries be set for this sort of government-sponsored discrimination.

The court itself thus acknowledged that the BZA's purpose was "to limit or reduce the number of students in the area." (*Id.*) Nevertheless, while it focused directly on the *rationality* of drawing lines based on student status (from its perspective and without evidentiary support), the court of appeals failed to analyze the legitimacy of the BZA's stated government purpose of reducing the number of that class of persons, or indeed, any class of persons, in a particular neighborhood. The court thus put its constitutional imprimatur on regulators devising ways to prevent an entire class of persons from residing in the neighborhood of their choice simply to keep that class of persons out of the neighborhood and thereby preserve its "character." Acknowledging, however, that the BZA's goal may have been facially contrary to the DCHRA, the court of appeals held only that "a breach of local law does not of itself violate substantive due process." (App. 12a.)

The court of appeals also rejected the notion that this sort of disparate treatment in the service of an openly discriminatory and illegitimate motive was independently an equal protection violation because, in its view, "the university does not make a serious analytical case for the proposition that students should be viewed as a 'suspect class' for equal protection purposes." (App. 11a.) The court thus ignored the need for any discriminatory regulation to serve a legitimate public purpose, even if it does not involve a suspect class of persons. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).[7]

REASONS FOR GRANTING THE PETITION

In upholding the BZA's openly and intentionally discriminatory Order, the District of Columbia Circuit applied a standard that dramatically reduces constitutional protections

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[7] The court of appeals also upheld the district court's rejection of GW's separate, facial equal protection challenge to the District of Columbia's "campus plan" scheme, which treats universities differently from other property users. That ruling is not the subject of this petition.

available to citizens who are subjected to arbitrary, unlawful land use decisions. Its decision paves the way for local regulators to impose far-reaching and invasive restrictions on universities in ways that transcend ordinary "Town versus Gown" disputes.

While this Court in recent years has decided cases that clarify the relevant standards for analysis of constitutional challenges to land use regulation in the takings, procedural due process and equal protection contexts, it has not squarely addressed the substantive due process limitations, if any,[8] on local land use regulators' actions that affect protected property interests. This has led the lower courts and commentators alike to bemoan the conflicting state of the law in this area. *See, e.g., Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215 (6th Cir. 1992) (there is "much-needed uniformity among the federal courts on this subject."); *Anderson v. Collins*, No. 2:96-CV-269, 1998 WL 1031496, at *3 (E.D. Ky. July 14, 1998) (observing that "federal courts' treatment of substantive due process in the area of zoning and land use . . . is unsettled and diverse"); Stewart M. Weiner, Comment, *Substantive Due Process in the Twilight Zone: Protecting Property Interests From Arbitrary Land Use Decisions*, 69 TEMP. L. REV. 1467 (1996). And, although the court below rejected even the concept of an equal protection claim under a "shadow" due process analysis, other circuits have ruled that the standards are the same.[9]

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[8] *Cf. City of Cuyahoga Falls*, __ U.S. at __, 123 S. Ct. at 1397 (Scalia, J., concurring).

[9] *See, e.g., Gary v. City of Warner Robins*, 311 F.3d 1334, 1339 n.10 (11th Cir. 2002) ("[T]he rational basis test utilized with respect to an equal protection claim is identical to the rational basis test utilized with respect to a substantive due process claim."); *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir. 1993) (same standard applies to equal protection and substantive due process land use claims); *Unity Ventures v. Lake County*, 841 F.2d 770, 775 n.2 (7th Cir. 1988) (same).

This case presents an opportunity, based on an extensive factual record and two lower court opinions, for the Court to articulate standards against which to judge substantive due process and equal protection challenges to local land use regulation and thereby ensure more consistent treatment of similar claims nationwide. Plenary review of the decision below is therefore warranted.

I. THE COURT SHOULD CLARIFY THAT LAND USE REGULATION MUST SERVE A LEGITIMATE GOVERNMENT PURPOSE TO SURVIVE A SUBSTANTIVE DUE PROCESS CHALLENGE

A. The Case Law Regarding the Analysis of Substantive Due Process Claims in the Context of Land Use Regulation Is a Veritable Quagmire

This Court has emphasized that "[t]he touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (internal citations and quotation marks omitted). Although the Court's decision in *Lewis* certainly suggests that government action exercised other than "in the service of a legitimate governmental objective" would run afoul of due process protections (at least in the context of executive action), the federal courts' application of the *substantive* aspect of this principle to property owners' challenges to land use regulation by local zoning authorities has been anything but consistent and clear.

As the Sixth Circuit has observed, "the circuits [are] deeply divided concerning the theories to be employed in federal court cases challenging zoning." *Pearson*, 961 F.2d at 1214. Moreover,

> The circuits are in substantial disagreement on the role

> of the federal courts in reviewing zoning claims of [the "arbitrary and capricious" substantive due process] kind. Although the Supreme Court has held that federal review of local zoning on arbitrary and capricious substantive due process grounds is valid in appropriate cases, *it has never laid down definitive standards of review.*

Id. at 1217 (emphasis added) (citing *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 373 (1926); and *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977)). Indeed, the wide disparity and conflict among the circuit courts' decisions on this topic led the *Pearson* court to exclaim,

> We wish it were within our power to harmonize these decisions, but the conflicts among circuits are too great. *Harmony will have to await action by the Supreme Court.*

Id. at 1220, n.45 (emphasis added).

This Court has addressed the standards applicable in other constitutional challenges to land use actions, particularly in the takings arena. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). And it has recently addressed limited aspects of the due process challenge to land use action that arose out of local regulators' ministerial compliance with (as opposed to defiance of) state legislation. *See City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, __ U.S. __, 123 S. Ct. 1389 (2003). Although the Court has articulated the standard applicable to due process challenges to abusive executive action by government officials, *see Lewis*, 523 U.S. at 845-46, to date it has not revealed standards to be applied by the courts in substantive due process challenges to local land use regulation. This case provides the perfect opportunity for the

Court to harmonize the conflicting and confusing case law, and to establish the definitive constitutional standards governing local zoning authorities' regulation of property development throughout the nation.

The confusion bemoaned by the *Pearson* court in 1992 has, if anything, worsened since then. In the First Circuit, the "dispositive question [in substantive due process analysis] is whether the challenged legislation bears a rational connection *to a legitimate public purpose*." *S. County Sand & Gravel Co. v. Town of S. Kingstown*, 160 F.3d 834, 836 (1st Cir. 1998) (emphasis added). In the Second Circuit, in zoning cases, "'substantive due process . . . standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority.'" *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 505 (2d Cir. 2001) (quoting *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999). *See also* Christopher R. Bryant, Comment, *Zoning Out Due Process: W.J.F. Realty Corp. v. Town of Southampton*, 73 ST. JOHN'S L. REV. 565, 567 (1999) (arguing that the New York Supreme Court's substantive due process decision in *W.J.F. Realty Corp. v. Town of Southampton*, No. 004906/1993 (N.Y. L.J., Dec. 16, 1997), *rev'd on other grounds*, 690 N.Y.S.2d 725 (N.Y. App. Div. 1999), "while in keeping with . . . the Second Circuit, . . . provides municipalities sweeping immunity from due process violations through self-legislated discretion to grant or deny a particular application" (footnote omitted)).

It used to be the case that "[t]he Third Circuit [would] grant relief on the basis of substantive due process where the zoning decision is irrational in the strict sense or prompted by invidious political or discriminatory motives." *Pearson*, 961 F.2d at 1218 (footnote omitted) (citing *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 683 (3d Cir. 1991); *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988) and *Pace Res., Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1035-36 (3d Cir. 1987)). Now, however, a property owner pressing a

substantive due process claim against zoning authorities can succeed only by proving that their decision "shocks the conscience." *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003). Reasoning that the standard announced with respect to *executive* abuses in *Lewis*, 528 U.S. 833, "has superceded prior decisions of our Court holding that a plaintiff asserting that a municipal land-use decision violated substantive due process need only show that the municipal officials acted with an 'improper motive,'" *id.* at 394, the court in *United Artists* held that the "shocks the conscience" standard is applicable not only to executive action, but to zoning cases as well, and that "*Bello* and its progeny are no longer good law." *Id.* at 401.

In contrast, the Fourth Circuit applies the traditional "rational basis" test regularly applicable to legislative actions. *See, e.g., Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002) (holding that the challenged zoning determinations "clearly did not fall beyond the outer limits of legitimate governmental action. In fact, quite the opposite is true. The County's actions were *rationally related to a legitimate governmental purpose*." (Emphasis added)); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 827 (4th Cir. 1995) ("In more recent decisions, the Supreme Court has narrowed the scope of substantive due process protection in the zoning context so that such a claim can survive *only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning*." (Emphasis added)). The Fifth Circuit likewise requires a legitimate government interest: "[G]overnment action comports with substantive due process if the action is *rationally related to a legitimate government interest.* Only if such government action is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare, may it be declared unconstitutional." *FM Props. Operating Co. v. City of Austin*,

93 F.3d 167, 174 (5th Cir. 1996) (emphasis added) (internal quotation marks and citations omitted).

In its decision in *Pearson*, the Sixth Circuit delineated its standards for substantive due process review of decisions by local zoning regulators:

> [S]ubstantive due process requires that both state legislative and administrative actions that deprive the citizen of life, liberty or property must have some rational basis. Federal court review of the two types of action differs in that in reviewing *administrative* action the federal court must make an extremely limited review of the evidence as described above, but in reviewing *legislative* acts, even that is not permitted, the only permissible inquiry -- absent equal protection, First Amendment or other such considerations -- being whether the legislative action is rationally related to legitimate state land use concerns.

Id. at 1223. In setting out these standards, the *Pearson* court nevertheless expressed a preference for employing the "shocks-the-conscience" test to zoning decisions:

> Although the "shocks the conscience" . . . is more apt for cases involving physical force, it is useful in the zoning context too, to emphasize the degree of arbitrariness required to set aside a zoning decision by a local authority -- and to underscore the overriding precept that "arbitrary and capricious" in the federal substantive due process context means something far different than in state administrative law.

Id. at 1222 (citations omitted).

In the Seventh Circuit, "[l]and use regulations satisfy substantive due process if they do not violate a specific constitutional guarantee and are rationally related to a *legitimate governmental interest*." *Durigan v. Sanitary Dist. No. 4-Town of Brookfield*, 5 Fed. Appx. 492, 494-95 (7th Cir.

2001) (emphasis added). *See also Pro-Eco, Inc. v. Bd. of Comm'rs of Jay County*, 57 F.3d 505, 514 (7th Cir. 1995) ("In order to claim that a zoning ordinance interferes with its substantive rights, [a claimant] must be able to demonstrate either that the ordinance infringes a fundamental liberty interest, . . . or that the ordinance is 'arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" (Quoting *Euclid*, 272 U.S. at 395) (other citation omitted)).

The "Eighth Circuit judges are in disagreement among themselves as to the correct approach to federal review of local zoning . . . ." *Pearson*, 961 F.2d at 1219 (citing *Lemke v. Cass County*, 846 F.2d 469, 470 (8th Cir. 1987)). *See also Roy v. City of Little Rock*, 902 F. Supp. 871, 874 n.4 (E.D. Ark. 1995) (noting that different 8th Circuit decisions have both recognized and denied the existence of a substantive due process cause of action with respect to land use decisions). The Eighth Circuit has characterized its substantive due process standard as requiring the claimant to demonstrate "something more than that the government decision was arbitrary, capricious, or in violation of state law," to show that the zoning action is "truly irrational." *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992). No decision since then appears to have changed this approach.

The Ninth Circuit "will subject local zoning decisions to substantive due process review, but the scope of review is that for legislation, even as to an individual property owner's claim, and *any relationship to a proper zoning goal*, such as prevention of traffic congestion, will be sufficient." *Pearson*, 961 F.2d at 1219 (emphasis added) (citing *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990). *See also, e.g., Patel v. Penman*, 103 F.3d 868, 874 (9th Cir. 1996) ("To establish a violation of substantive due process in [a zoning] context, a plaintiff is ordinarily required to prove that a challenged government action was 'clearly arbitrary

and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" (Quoting *Euclid*, 272 U.S. at 395)); *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir. 1993) (stating that the requirement that the challenged action "need only be rationally related to a legitimate state interest . . . also applies to substantive due process challenges to property zoning ordinances" (citations omitted)).

In the Tenth Circuit, on the other hand, "the arbitrary and capricious standard . . . has been applied in the context of zoning." *Crider v. Bd. of County Comm'rs of Boulder*, 246 F.3d 1285, 1289 (10th Cir.), *cert. denied*, 534 U.S. 890 (2001). Moreover, "the arbitrary and capricious standard in the context of zoning does not mean simply erroneous. Rather, such a claim can survive only *if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through zoning.*" *Id.* (emphasis added) (internal quotation marks and citation omitted).

Under the decisions of the Eleventh Circuit, "[t]he substantive component of the Due Process Clause prohibits a government entity from applying to property a zoning classification that bears no relationship to the public health, safety, morals, or general welfare and thus is beyond the government's police power." *Bickerstaff Clay Prods. Co. v. Harris County*, 89 F.3d 1481, 1489 (11th Cir. 1996) (internal quotation marks and citation omitted). *See also Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1214 (11th Cir. 1995) ("Substantive due process challenges to zoning regulations are analyzed under the rational basis standard. Under this standard, a zoning decision will be upheld if it has a rational relationship with a legitimate general welfare concern." (Internal quotation marks and citation omitted)).

Finally, as the court in *Pearson* noted, and as the court of appeals confirmed in this case, "the District of Columbia Circuit applie[s] a very deferential standard of review under

substantive due process. It [has] held that '[o]nly a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983.'" *Pearson*, 961 F.2d at 1219 (quoting *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir.), *cert. denied*, 488 U.S. 956 (1988)).

In sum, the First, Fourth, Fifth, Seventh, Ninth, Tenth and Eleventh Circuits employ varying analyses, all of which, however, require consideration as to whether the challenged regulation serves a legitimate government purpose. The Second, Third, Eighth, District of Columbia and, arguably, the Sixth Circuits, on the other hand, as the District of Columbia Circuit did here, decide such cases based only on the rationality of the action, without expressing concern for or requiring consideration of the legitimacy of the purpose behind the action. As a result, not all the circuits are in line with what this Court has implied but never explicitly stated: that zoning decisions cannot survive scrutiny under substantive due process, as forgiving as that scrutiny may be, where the government interest being served is illegitimate, as is true of the BZA's Order in this case.

Granting certiorari in this case will enable the Court to quell the confusion among the appellate courts and to establish definitive, nationwide, standards for substantive due process review.

B. This Court Should Clarify That Substantive Due Process Does Not Permit Local Regulators to Restrict Property Uses for Facially Illegitimate and Discriminatory Purposes

The courts of appeal generally agree on the need to identify, as a threshold matter, a constitutionally protected property interest with which the challenged land use regulation has interfered; they do not always, however, agree on the criteria for identifying such an interest. (App. 5a-7a

(cataloguing circuit split regarding property interest analysis).) In this case, the court of appeals held that GW possessed the requisite property interest, and then moved to the next stage of the analysis.

Beyond the need to identify a property interest, the only consistent thread that emerges in the substantive due process cases from other circuits, as described above, is the requirement of most circuits that any regulation be rationally related to a legitimate government interest. *See*, *supra*, discussion in Part I. A., pp. 15-20.

No doubt the majority of circuits have adopted formulations for due process review that require an analysis of the legitimacy of the public interest served by the regulation at issue because this Court's decisions strongly suggest such a requirement. The Court has emphasized that "[t]he touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, *or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective*." *Lewis*, 523 U.S. at 845-46 (emphasis added, internal citations and quotation marks omitted). Under decisions dating back to *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977), and *Nectow v. Cambridge*, 277 U.S. 183, 189 (1928), the Court has held that zoning regulation will not withstand constitutional scrutiny unless it is rationally related to a legitimate public purpose. Because in most instances the public purpose (at least the expressed public purpose) for the regulation is unimpeachably proper, the focus is usually on the rationality of the means employed to achieve the regulators' legitimate goals.

The court of appeals in this case focused *only* on the rationality side of such an analysis, applying its *Silverman v. Barry* formulation. While GW obviously disagrees with the court's conclusion as to constitutional rationality, the more fundamental manner in which the analysis departs from the

framework applied in seven of the twelve circuits is in failing to address the legitimacy of the government interest expressed. For instance, the Eleventh Circuit has ruled:

> Substantive due process challenges to zoning regulations are analyzed under the rational basis standard. Under this standard, a zoning decision will be upheld if it has a rational relationship with a legitimate general welfare concern. Our recent *Haves v. City of Miami* decision [52 F.3d 918 (11th Cir. 1995)] sets out a two-step procedure determining whether a zoning decision survives such rational basis scrutiny. 52 F.3d at 921-24. "The first step in determining whether legislation survives rational-basis scrutiny is identifying a legitimate government purpose—a goal—which the enacting government body *could* have been pursuing." *Id.* at 921 (emphasis in original).

Restigouche, 59 F.3d at 1214 (footnote omitted).

In contrast, in its decision below, the court of appeals repeatedly identified the purpose of the BZA actions ("BZA imposed conditions aimed at ... rolling back encroachment into Foggy Bottom by ... students" (App. 2a); and "measures designed to limit the presence of undergraduates," (App. 4a)), but failed to address the facial illegitimacy of such goals under District of Columbia law.

The court ultimately acknowledged GW's argument that the DCHRA prohibited discrimination against students, specifically in housing matters. (App. 11a (citing D.C. Code § 2-1402.21).) The court even quoted the Act's statement that "'it is the intent of the Council of the District of Columbia ... to secure an end in the District of Columbia to discrimination ... by reason of ... matriculation.'" (*Id.*) Rather than apply those principles to the legitimacy of the express purpose of the BZA's Order, however, the panel stated simply, "But even if GW reads District law correctly, a breach of local law does not of itself violate substantive due process." (App. 11a-12a.)

It is, of course, true that every violation of local law is not, by definition, a violation of substantive due process. As the Court noted in *Silverman*, "inadvertent errors, honest mistakes, agency confusion, even negligence in the performance of official duties, do not warrant redress under [42 U.S.C. § 1983]." 845 F.2d at 1080. But that is only one aspect of the required analysis, and does not mean that a violation that goes to the fundamental legitimacy of the stated governmental purpose is legally irrelevant. Even the court below, in a different context, has made clear that, while every violation does not necessarily constitute a due process violation, some do, and they must be analyzed accordingly. *See Tri County Indus. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997) (holding that "the manner in which the violation occurs as well as its consequences are crucial factors to be considered" (quoting *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 944 (D.C. Cir 1988))).

It appears that the court of appeals in this case misapplied the "violation of state law" principles that have been applied in challenges to the *means* by which properly motivated governmental action is carried out (*e.g.*, *Comm. of U.S. Citizens*, 859 F.2d at 944-45), to the violation here, which defines the governmental *ends* or purpose as illicit and unlawful, and thereby infects the entire action. It is difficult to envision any way that the BZA's goals, as articulated by the appellate court itself, could be found to be proper government purposes, particularly in the District of Columbia in the face of its Human Rights Act. Were this standard to be adopted and applied in other land use cases, it would send a message to zoning officials that they were free to craft legislation designed to exclude any class of persons (other than those protected be federal law) from particular neighborhoods. This message creates the potential for far-reaching mischief, especially insofar as it will be sent to those officials already struggling to resist vocal community members' efforts to keep one class of resident or another out

of "their" neighborhood. This Court should grant certiorari in order to make clear that regardless of the rationality of the *means* used by land use regulators to achieve their desired end, substantive due process requires that the end be consistent with a legitimate government interest, as defined by reference to local law.

C. A Heightened Standard of Review Should Apply in Assessing the Legitimacy of Regulations That Interfere with a University's Fundamental Self-Governance

GW argued in the court of appeals that, as explained above, the BZA's action was particularly problematic insofar as it carried with it far-reaching implications regarding University policies and practices. The BZA Order interferes not only with the more obvious University decisions such as whether to be a predominantly "residential" university, and whether to construct a new physics lab, business school or other non-residential project that the BZA would prevent until the requisite housing was developed. The BZA requirement that the University provide an additional bed for every student, regardless of whether that student would use it, would pressure the University to alter its admissions practices, as students who could not or would not occupy (and pay for) an on-campus bed would cost the University far more to admit.

The court below ignored the impact of a zoning board dictating such fundamental university self-governance. It dismissed the University's arguments as to the irrationality of the BZA effectively requiring GW to house an unprecedented percentage of its undergraduates, commenting only that some prestigious universities house higher percentages of their undergraduates. (App. 13a.) Other universities also admit students with lower, and some higher, average SAT scores than does GW. And some other universities house none of their students. Courts have recognized, however, that such decisions are beyond the purview of local land use regulators. *See, e.g., In re Summit Sch. v. Neugent*, 442 N.Y.S.2d 73, 77

(N.Y. App. Div. 1981) (observing that conditions "which may intrude upon the educational processes of the [school], as opposed to their use of real property, are contrary to public policy"); *Inc. Vill. of Brookville v. Paulgene Realty Corp.*, 200 N.Y.S.2d 126, 134 (N.Y. Trial Term 1960) (in striking down portion of zoning ordinance that limited number of students on parcel of property, noting that "[i]t is clear from a reading of [the zoning enabling law] how far the [zoning authority] has strayed outside the field of zoning"), *aff'd*, 218 N.Y.S.2d 264 (N.Y. App. Div. 1961), *aff'd*, 11 N.Y.2d 672 (1962).

While the BZA's action in this case would no doubt constitute unconstitutional interference with any property owner's rights due to the facial illegitimacy of the stated purpose of the regulation, GW's university status warrants a heightened level of review. First, in contrast to the BZA's treatment of GW and its students in this case, educational uses of the land are favored because of the presumed ways in which schools and universities serve the public welfare. "[C]ourts regard educational [land] uses as worthy of special consideration," and therefore "carefully scrutinize municipal regulations which tend to limit schools, and they hold invalid regulations which unreasonably restrict their educational functions." 2 *Anderson's American Law of Zoning* § 12.09, at 530 (Kenneth H. Young ed., 4th ed. 1996). *See also Glenbrook Rd. Ass'n v. D.C. Bd. of Zoning Adjustment*, 605 A.2d 22, 32 (D.C. 1992) ("[I]t has long been recognized . . . that universities serve the public welfare and morals in important ways . . . . In general, uses of land for educational purposes are 'highly favored.'"); *Cornell Univ. v. Bagnardi*, 503 N.E.2d 509, 513 (N.Y. 1986) (stating that colleges and universities "by their very nature, singularly serve the public's welfare and morals").

As this Court long ago said, "The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently

promoted." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). The principle that universities should have freedom to chart their own courses, "freedom of the university from external control over its academic undertakings," has roots predating our Constitution. Frederick J. Crosson, *Two Faces of Academic Freedom*, in *The Challenge and Promise of a Catholic University* 45, 47 (Theodore M. Hesburgh ed., 1994). In 1819 this Court decided the landmark case of *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), in which it held that a state legislature could not, by changing a college's charter, interfere with its governance. As one commentator has explained, the *Dartmouth College* case "put the American college beyond the control of popular prejudice and passion; *** it also put the colleges beyond the control of people who understood neither the colleges nor their problems." Frederick Rudolph, *The American College and University: A History*, 211 (1990).

For these reasons, the federal courts have since cautioned that government, and even judicial, interference in university administration must be as narrow as possible to carry out legitimate regulation. *See Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993) ("We are a society that cherishes academic freedom and recognizes that universities deserve great leeway in their operations."); and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.").

This Court has recognized that the Due Process clause protects "fundamental liberty interests" from unreasonable governmental interference. *Glucksberg*, 521 U.S. at 721. *See also City of Cuyahoga Falls*, __ U.S. at __, 123 S. Ct. at 1397 (Scalia, J. concurring) (substantive due process protects "fundamental liberty interests," even if not regulation of

land). In *Glucksberg*, the Court explained that one of the important criteria in determining whether such a liberty interest merited substantive due process protection was whether it was "so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment." 521 U.S. at 727. Academic freedom is just such a deeply-rooted interest.

GW has never contended that it, or any other university, should be free from legitimate land use regulation. It does, however, contend that its status as a university, and the historic protection of our universities' academic freedom as such, should warrant the courts reviewing under a stricter standard any regulation that goes beyond imposing reasonable limits on the externalities of university operation, such as traffic, noise and crowding, and that interferes with the University's ability to chart its own course. The Court should grant certiorari in order to establish such a heightened standard of review.

II. THIS COURT SHOULD CLARIFY THAT THE DISPARATE TREATMENT OF A CLASS OF PERSONS FOR AN ILLEGITIMATE GOVERNMENT PURPOSE IS AN EQUAL PROTECTION VIOLATION EVEN THOUGH THE AFFECTED PERSONS ARE NOT WITHIN A "SUSPECT CLASS"

Addressing the University's argument under *Silverman*, 845 F.2d at 1080, that this case presented a clear example of a "group animus" toward students (which seems hard to deny), the court acknowledged that it seemed "inescapable" that the BZA had drawn lines based on student status. (App. 10a.) The court then diverted its course, however, and abruptly concluded that students were not a "suspect class" and that "creation of a sort of shadow equal protection doctrine in the name of 'substantive due process' seems just the sort of error against which we and others have cautioned." (App. 11a

(citing *Tri County*, 104 F.3d at 459).) The court of appeals thus held that, because students were not a protected class in the constitutional jurisprudence, there should be no cognizable claim that their disparate treatment amounted to a constitutional violation, whether under a substantive due process or equal protection rubric, regardless of the stated motive.

Equal protection challenges to discriminatory regulation involving non-suspect classes are subject to "rational-basis" review. *Cleburne*, 473 U.S. at 452. As the Court more recently explained:

> Under rational-basis review, where a group possesses "distinguishing characteristics relevant to interests the State has authority to implement," a State's decision to act on the basis of those differences does not give rise to a constitutional violation. [*Cleburne*] at 441. "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."

Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 366-67 (2001) (quoting *Heller v. Doe,* 509 U.S. 312, 320 (1993). The Court in *Garrett* recognized the practical reality that government regulators often do not articulate their purposes for regulation; therefore, the courts are entitled to assume a purpose – a rational basis – for the classification unless demonstrated otherwise. *Id.* at 367. The Court then, however, restated the "widely acknowledged tenet of this Court's equal protection jurisprudence that state action subject to rational-basis scrutiny does not violate the Fourteenth Amendment when it 'rationally furthers the purpose *identified by the State*,'" thus assuming that, if a purpose is articulated, it would be legitimate. *Id.* (emphasis added) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976)). It is apparently this standard that the court of

appeals applied, upholding the regulation despite its articulated *improper* purpose.

This Court has not addressed the situation where, as here, the local government regulators *do* articulate their purpose, whereby no assumptions as to purpose are necessary, but the purpose is facially illegitimate under the local law. There, of course, the means devised tautologically serve the "purpose identified by the state," but may well not bear any relationship to legitimate zoning concerns. Thus, whether that regulation bears any relation to a "legitimate public purpose" is an entirely different question in this case than whether it serves the "purpose identified by the state." The Court should clarify this gap in the jurisprudence by explaining that the articulated purpose is determinative for equal protection purposes. Tolerating local regulators themselves defining the goals they must serve paves the way for land use decisions that draw lines based on personal attributes rather than uses of the land.

It is for just these reasons – that regulators should not make zoning distinctions based on the occupation of the user of the land rather than the use of the land – that state courts that have considered similar efforts by local regulators to prevent students from encroaching on residential neighborhoods have struck them down as unconstitutional. Indeed, this Court declined to review Maryland's highest court's decision in *Kirsch v. Prince George's County*, 626 A.2d 372 (Md.), *cert. denied*, 510 U.S. 1011 (1993), in which the Maryland Court of Appeals struck down a county "mini dorm" ordinance under both federal and state constitutions because it imposed conditions on student houses in residential neighborhoods that were not imposed on houses occupied by non-students. The court in *Kirsch* reasoned that differentiation between tenant classes "based solely on the occupation which the tenant pursues away from that residence is that sort of arbitrary classification forbidden under our constitutions." *Id.* at 380. *See also Coll. Area Renters & Landlord Ass'n v. City of San*

Diego, 50 Cal. Rptr. 2d 515, 516 (Cal. Ct. App. 1996) ("mini-dorm" regulation an equal protection violation).

In this case, the anti-student motive was transparent and indeed openly acknowledged, despite the existence of a statute forbidding such discrimination. Even though the BZA action was expressly *not* based on student behavior, the court of appeals assumed an "implicit basis for the Board's distinction of students from others – namely that they pose a risk of behavior different from that generally preferred by non-student residents and legally relevant." (App. 11a.) The basis could only have been *implicit*, given that, as noted above, there was no evidence to prove that any such stereotypical prejudices about student behavior were warranted.

The danger inherent in a federal court condoning local regulation that implicitly or explicitly characterizes any class of persons as undesirable neighbors "unsubstantiated by factors which are properly cognizable in a zoning proceeding" *Cleburne*, 473 U.S. at 448, is manifest. The implications are infinitely more troublesome when the characterization is rationalized by the court's own construction of an "implicit basis" grounded in broad, prejudicial assumptions about the likely behavior of that entire class of persons. This Court should grant certiorari in order to confirm that the constitutional guarantee of equal protection prohibits land use regulators from discriminating between classes of persons based on their status rather than on their use of land.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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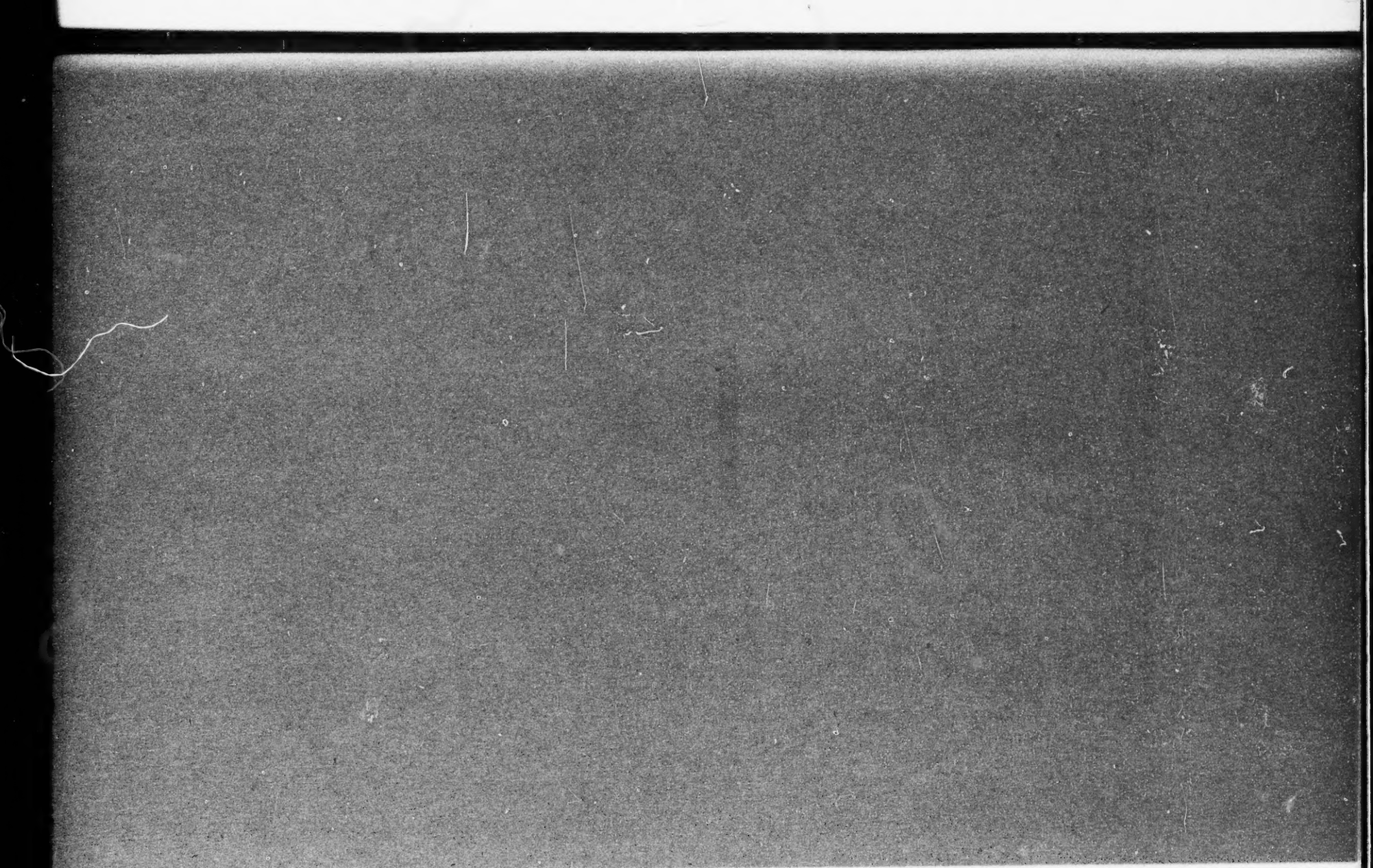

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 24, 2002 Decided February 4, 2003

As Amended February 11, 2003

No. 02-7055
& No. 02-7060

GEORGE WASHINGTON UNIVERSITY,
A FEDERALLY CHARTERED UNIVERSITY,
APPELLEE/CROSS-APPELLANT

v.

DISTRICT OF COLUMBIA, A MUNICIPAL
CORPORATION, ET AL.,
APPELLANTS/CROSS-APPELLEES

Appeals from the United States District Court
for the District of Columbia
(No. 01cv00895)

Bills of cost must be filed within 14 days after entry of judgment. The court also looks with disfavor upon motions to file bills of costs out of time.

Lutz Alexander Prager, Assistant Deputy Corporation Counsel, argued the cause for appellants/cross-appellees. With him on the briefs were *Charles L. Reischel*, Deputy Corporation Counsel, and *Donna M. Murasky*, Assistant Corporation Counsel.

Deborah B. Baum argued the cause for appellee/cross-appellant. With her on the briefs were *David J. Cynamon* and *J. Thomas Lenhart*.

Before: GINSBURG, *Chief Judge*, HENDERSON, *Circuit Judge*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* WILLIAMS.

Concurring opinion filed by *Circuit Judge* HENDERSON.

WILLIAMS, *Senior Circuit Judge*: This case is the most recent stage of a long-running land-use dispute between George Washington University ("GW" or "the university") and the District of Columbia's Board of Zoning Adjustment (the "Board" or the "BZA"). GW's campus is bounded on the west and north by the District's Foggy Bottom and West End neighborhoods (here referred to collectively as "Foggy Bottom"), and the BZA has been concerned about protecting their residential character and "stability." In an order approving the university's long-term campus improvement plan (the "BZA Order" or the "Order") the BZA imposed conditions aimed at limiting, and even rolling back, encroachment into Foggy Bottom by the university – or, more precisely, its students. The district court upheld some of the conditions, but also found some to be unconstitutional denials of substantive due process. Both sides appealed; we find no constitutional violation.

* * *

The District's zoning scheme for universities, promulgated by the Zoning Commission pursuant to the authority granted by D.C. Code § 6-641 and codified at 11 District of Columbia Municipal Regulations ("DCMR") §§ 210, 302.2 & 507, permits university use as a matter of right in areas zoned for high-density commercial use. For land zoned residential or "special purpose," it permits university use as a special exception. GW's land evidently includes high-density commercial, special purpose, and residential portions. In the areas where university use is by special exception, the owner must secure permission for specific university projects in a two-stage application process. In the first stage, the university submits a "campus plan" that describes its general intentions for new land use over a substantial period (GW's preceding plan was for 15 years). On approval by the Board – an approval that can be subject to a set of conditions designed to minimize the impact of the proposed development – the campus plan "establish[es] distinct limitations within which all future construction must occur." *Levy v. D.C. Bd. of Zoning Adjustment,* 570 A.2d 739, 748 (D.C. 1990). In the second stage, the BZA reviews individual projects that the university proposes to undertake, evaluating them both for consistency with the campus plan and the zoning regulations. See *Draude v. D.C. Bd. of Zoning Adjustment,* 527 A.2d 1242, 1247-48 (D.C. 1987).

In both stages, the BZA has substantial, but not unbounded, discretion to reject or approve the university's application. It is instructed to make sure that any university use is located so that it is "not likely to become objectionable to neighboring property because of noise, traffic, number of students or other objectionable conditions." 11 DCMR § 210.2. When reviewing a special exception

application for a university, the BZA is also to consider the policies of the so-called "District Elements of the [Comprehensive] Plan," *id.* § 210.7, a planning document setting out development policies for the District, 10 DCMR § 112.6(b). If the application meets these criteria – that is to say, the proposed use is consistent with the Comprehensive Plan and is not likely to become objectionable to users of neighboring property – the Board "ordinarily must grant [the] application." *Stewart v. D.C. Bd. of Zoning Adjustment,* 305 A.2d 516, 518 (D.C. 1973).

In late 1999 the university submitted a campus plan for the years 2000-10, reflecting its intentions to expand. Although BZA's concern over the university's effects on Foggy Bottom had been expressed in review of its 1985 plan, the sharp expansion of its enrollment in the 1990s made the issue more acute. Relying in part on submissions of the District's Office of Planning, the BZA found that the university's past acquisition of buildings in Foggy Bottom (and their subsequent conversion into dormitories or student apartments), as well as undergraduates' informal off-campus housing, threatened the "livability and residential character" of the Foggy Bottom neighborhood. As a result, it conditioned its approval of the 2000 Campus Plan on a series of measures designed to limit the presence of undergraduates; these measures included provisions requiring the university to house its freshmen and sophomores on campus and to provide on-campus housing for at least 70% of its students, and imposing an enrollment cap tied to the university's supply of on-campus housing.

The university challenged the BZA action in federal district court in 2001, and won a preliminary injunction against enforcement of parts of the BZA order. *George Washington University v. District of Columbia,* 148

F. Supp. 2d 15 (D.D.C. 2001). But the court conditioned enforcement of the injunction on GW's pursuit of the same relief before the District of Columbia Court of Appeals, *id.* at 19, which in turn remanded the order to the BZA for revision. The BZA then eliminated the enrollment cap but required the university to provide housing on campus or outside of Foggy Bottom for 70% of its approximately 8000 undergraduates, plus one on-campus or non-Foggy Bottom bed for every fulltime undergraduate student over 8000. The new Order issued on January 23, 2002, and GW promptly renewed its court challenge. The district court found that several conditions of the BZA Order, including the new housing requirements, violated the university's right to substantive due process, but rejected its claims that the zoning regulations were facially unconstitutional and that the District's actions infringed on its First Amendment rights. *George Washington University v. District of Columbia,* Civil Action No. 01-0895 (D.D.C. Apr. 12, 2002). Both sides appealed. We reverse in part, finding no constitutional infirmities.

* * *

The university's primary challenges sound in substantive due process. Although that doctrine normally imposes only very slight burdens on the government to justify its actions, it imposes none at all in the absence of a liberty or property interest. See, e.g., *Bd. of Regents v. Roth,* 408 U.S. 564, 569-70 (1972).

In the land-use context courts have taken (at least) two different approaches for determining the existence of a property interest for substantive due process purposes. In *DeBlasio v. Zoning Bd. of Adjustment,* 53 F.3d 592, 601 (3d Cir. 1995), the Third Circuit held that an ownership

interest in the land qualifies. Other circuits, including the Second, Fourth, Eighth, Tenth and Eleventh Circuits, have focused on the structure of the land-use regulatory process, pursuing a "new property" inquiry, cf. Charles Reich, "The New Property," 73 YALE L. J. 733 (1964), and looking to the degree of discretion to be exercised by state officials in granting or withholding the relevant permission. See *RRI Realty Corp. v. Village of Southampton,* 870 F.2d 911, 917 (2d Cir. 1989); *Gardner v. Baltimore,* 969 F.2d 63, 68 (4th Cir. 1992); *Bituminous Materials v. Rice County,* 126 F.3d 1068, 1070 (8th Cir. 1997); *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence,* 927 F.2d 1111 (10th Cir. 1991); *Spence v. Zimmerman,* 873 F.2d 256, 258 (11th Cir. 1989). GW urges us to adopt the Third Circuit's approach but also contends that it has a "new property." Because we agree on the latter point, we need not decide whether the Third Circuit's approach is sound or exactly how it would apply.

The majority approach may seem at odds with ordinary language, in which we would say, for example, that a particular piece of land in Washington is "the property" of GW. But an all-encompassing land use regulatory system may have either replaced that "property" with a "new property" (or with several, one for each authorized class of use), or conceivably have replaced it with less than a new property (thereby, one would suppose, effecting a taking).

Within the majority there is considerable variety in the courts' formulae for how severely official discretion must be constrained to establish a new property. The Second Circuit apparently will not find one if the authority has any discretion to deny approval of the proposed land use. See *Natale v. Town of Ridgefield,* 170 F.3d 258, 263 (2nd Cir. 1999). The Eighth Circuit, in contrast, inquires

whether the "statute or regulation places substantial limits on the government's exercise of its licensing discretion," *Bituminous Materials v. Rice County,* 126 F.3d 1068, 1070 (8th Cir. 1997); see also *Littlefield v. Afton,* 785 F.2d 596, 602 (8th Cir. 1986) (asking whether "the City's decision making power is significantly and substantially restricted"), finding a property interest if the agency is so constrained. In our view, the Eighth Circuit's analysis is more in line with analogous Supreme Court precedent and the precedent of this circuit. See, e.g., *Kentucky Dep't of Corrections v. Thompson,* 490 U.S. 454, 463 (finding discretion to be constrained by "substantive predicates", such as an instruction that prison visitation may be denied when "the visitor's presence . . . would constitute a clear and probable danger"); *Olim v. Wakinekona,* 461 U.S. 238, 249 (inquiring as to whether there exist "substantive limitations on official discretion"); *Washington Legal Clinic v. Barry,* 107 F.3d 32, 36 (D.C. Cir. 1997) (applying *Olim*).

In practice, the fact patterns of new property cases in the land use arena seem to divide into two sets, one set involving virtually unlimited discretion, the other rather absolute entitlement. In *Bituminous Materials,* for instance, the regulation in question specified that the agency "may" grant the permit, without setting out any substantive standards to follow. 126 F.3d at 1070. Similar substance-less directives form the basis for the regulations at issue in *Gardner v. Baltimore,* 969 F.2d at 70 (noting that the regulations were "silent as to the substantive criteria used by the Commission to evaluate the sufficiency of those plans"); *Jacobs,* 927 F.2d at 1111 (noting that the board's discretion was limited only by a general "reasonableness" requirement, not a substantive standard); and *Spence v. Zimmerman,* 873 F.2d at 258 (finding no property

interest in a certificate that "*may* be issued for a portion of or portions of a building which may be safely occupied" but with no mandate for issuance even then). On the other side, for example, *Walz v. Town of Smithtown,* 46 F.3d 162, 168 (2d Cir. 1995), handily found a property interest when the highway superintendent was to issue a permit for street excavation to a public utility so long as its application stated "the nature, location, extent and purpose" of the excavation, and gave adequate undertakings that it would restore the street to its original condition. See also *Scott v. Greenville County,* 716 F.2d 1409, 1418 (4th Cir. 1983) (finding a property interest when permit must issue upon "presentation of an application and plans showing a use expressly permitted under the then-current zoning ordinance").

The university's expectations for a "special exception" fall between these poles, but we think closer to establishing, as *Bituminous Materials* said, "substantial limits on the government's exercise of its licensing discretion." Here, for a residential or special purpose parcel, university use "shall be permitted as a special exception" if the criteria for the exception are met. 11 DCMR § 210.1. Moreover, the District of Columbia courts have interpreted this provision to mean what it says – namely, that special exceptions must be issued as a matter of right if the qualifying criteria are met. "The Board's discretion . . . is limited to a determination whether the exception sought meets the requirements of the regulation. . . . [If so,] the Board ordinarily must grant [the] application." *Stewart v. D.C. Bd. of Zoning Adjustment,* 305 A.2d 516, 518 (D.C. 1973); see also *Gladden v. D.C. Bd. of Zoning Adjustment,* 659 A.2d 249, 255 (D.C. 1995).

Of course, some of these qualifying criteria are by no means self-defining. In particular, 11 DCMR § 210.2 says that university use shall be located so that it is "not likely to become objectionable to neighboring property." But combining this provision with 11 DCMR § 210.1 (see above), it seems inescapable that the BZA can deny the university a special exception only by an explicit finding that the proposed use is likely to become "objectionable" – a term that we think clearly places "substantive limitations on official discretion." Although 11 DCMR § 210.2 speaks of uses "objectionable to neighboring property because of noise, traffic, number of students or other objectionable conditions," plainly the final wrap-up clause does not invite the BZA members to apply their own personal tastes; they must rest the "objection [s]" either on the criteria specified in § 210.2 or otherwise made relevant by the Code, regulations, the Comprehensive Plan or other pertinent legal provisions.

In addition, the BZA's conduct and procedures indicate that it interprets the regulations as imposing substantive limits on its discretion. For instance, its Order of March 29, 2001 started with a series of detailed "findings of fact" establishing for the record the objective conditions created by the university's property use. See Joint Appendix ("J.A.")[1] 191-99. It states that it is "authorized to grant a special exception where, in the judgment of the Board *based on a showing of substantial evidence,* the special exception . . . will not tend to affect adversely the use of

[1] We note with dismay that the Joint Appendix, though only 400 pages long, is broken into five separate volumes, evidently to attain maximum achievable inconvenience.

neighboring property." *Id.* at 199 (emphasis added). Although of course a local law mandate of minimum procedures cannot generate an entitlement, *Hewitt v. Helms,* 459 U.S. 460, 471-72 (1983); *Cleveland Bd. of Education v. Loudermill,* 470 U.S. 532, 541 (1985), the District's provision of fairly formal procedures supports our reading of the regulations as imposing "substantial limits on the [Board's] exercise of its licensing discretion." *Bituminous Materials,* 126 F.3d at 1070.

Once a property interest is found, however, the doctrine of substantive due process constrains only egregious government misconduct. We have described the doctrine as preventing only "grave unfairness," *Silverman v. Barry,* 845 F.2d 1072, 1080 (D.C. Cir. 1988), and identified two ways in which such unfairness might be shown: "Only [1] a substantial infringement of state law prompted by personal or group animus, or [2] a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983." *Id.* See also *Tri County Industries v. District of Columbia,* 104 F.3d 455, 459-60 (D.C. Cir. 1997); *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461, 465-67 (7th Cir. 1988) (noting the "uncanalized discretion" inherent in substantive due process review and thus, given the otherwise resulting federal judicial intrusions on state and legislative authority, the need to limit its role to extreme cases).

In attacking the conditions, the university makes a stab at the "group animus" angle suggested in *Silverman,* saying that the BZA Order reflects the hostility of the Foggy Bottom residents to students. As Foggy Bottom is a residential area, and apartments occupied by students are indisputably a residential use, it seems inescapable that the District is drawing a distinction based on student

status. But just what sort of "group animus" the *Silverman* court had in mind is unclear. An equal protection violation would of course be independently unlawful, and the university does not make a serious analytical case for the proposition that students should be viewed as a "suspect class" for equal protection purposes. On the other hand, creation of a sort of shadow equal protection doctrine in the name of "substantive due process" seems just the sort of error against which we and others have cautioned. See *Tri County Industries,* 104 F.3d at 459 (cautioning against the use of substantive due process to address constitutional challenges directly governed by an explicit constitutional provision).

In any event, even assuming the legitimacy of any such shadow doctrine, the university offers us neither a "Brandeis brief" nor any other basis for even doubting the implicit basis for the Board's distinction of students from others – namely, that on average they pose a risk of behavior different from that generally preferred by non-student residents and legally relevant. Instead GW invokes District law to show the impropriety of such a distinction, pointing to provisions such as D.C. Code § 2-1402.21, which bars discrimination "based on . . . matriculation" for certain types of real estate transactions, and *id.* § 2-1401.01, saying that it "is the intent of the Council of the District of Columbia . . . to secure an end in the District of Columbia to discrimination . . . by reason of . . . matriculation." It also notes the District of Columbia Court of Appeals' observation that "a university – even a law school – is not to be presumed, for the purposes of the Zoning Regulations, to be the land use equivalent of the bubonic plague." *Glenbrook Rd. Ass'n v. D.C. Bd. of Zoning Adjustment,* 605 A.2d 22, 32 (D.C. 1992). But even if GW

reads District law correctly, a breach of local law does not of itself violate substantive due process. *Tri County Industries,* 104 F.3d at 459. Accordingly, we think the university falls short in its effort to show a deprivation of substantive due process by reference to "group animus."

Perhaps implicitly pointing to a "deliberate flouting of the law that trammels significant . . . property rights," GW also complains of what the District now calls the "transitional housing plan," Conditions 9(a)-(c) of the Order, which the district court found unconstitutional. These require the university to provide its undergraduates, no later than August 31, 2002, with a total of approximately 5600 beds (corresponding to 70% of the approximately 8000 undergraduates) located either on campus or off campus but outside the Foggy Bottom area. After August 31, 2006, the 5600 beds must be located entirely on campus. The parties agree that this requirement will force the university to acquire temporary accommodations for about 1400 students in off-campus, non-Foggy Bottom locations – accommodations that might be not only expensive (though the university has offered no data on just how large an expense) but less desirable for students than the university housing already available to students off-campus in Foggy Bottom.

GW spins these conditions as generating a completely irrational expense. It says that they in effect render "duplicative" the university's current off-campus student housing in Foggy Bottom, which is (concededly) in full conformity to the residential zoning there. But in reality nothing in the transitional housing plan forces the university to give up its off-campus Foggy Bottom dorms or prevents it from continuing to house students there. If it chooses, it can continue supplying that housing *in addition*

to the 5600 beds required by Conditions 9(a)-(c). If it chose that option, it would be providing housing to approximately 85% of its undergraduate students, a percentage that is hardly extraordinary for modern urban American universities; Harvard University, for instance, houses 98% of its undergraduates on campus, and Columbia University about 90%.[2] Of course, the university might choose instead to sell its off-campus Foggy Bottom properties or convert them to another use. But the fact that it might do so doesn't render the District's regulation an improper encroachment on its by-right use of those properties.

Nor is there any irrationality in the District's policy. Given the District's concern that an excess of students in the Foggy Bottom area is negatively affecting the character of the neighborhood, it cannot be irrational for the District to adopt rules likely to limit or reduce the number of students in the area. That seems to be the effect of the BZA Order: it guarantees that, of the approximately 8000 undergraduates, at least 5600 (70%) of them will be provided housing on-campus outside of Foggy Bottom; and since about 1250 students are commuters, married, disabled or for some other reason are not considered by GW to be "well suited for dormitory life", this leaves only about 1150 traditional undergraduates living off-campus in Foggy Bottom, whether their residence was in university properties or in private apartments. Obviously the

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[2] See, e.g., http://www.college.harvard.edu/student/residential_life (noting that all but 200 of the approximately 17,000 Harvard undergraduates live in university-provided housing); http://www.studentaffairs.columbia.edu/admissions/aboutcolumbia/campus/ (noting that 90% of Columbia undergraduates live in university residence halls).

university's alternative proposal – to count the off-campus Foggy Bottom properties towards the 70% requirement – would not as effectively limit the student presence in Foggy Bottom.

The district court also found a violation in certain provisions that the District characterizes as enforcement and severability mechanisms. Condition 9(e) prohibits the issuance of any new "permit to construct or occupy buildings for nonresidential use on campus" whenever "a semiannual report reveals that [GW] is not in compliance" with the conditions of the Order. The university claims that this condition is purely punitive, as it lacks any relationship to the District's goal of protecting the neighborhood. After all, it says, prohibiting the construction of non-residential buildings will not cause the new dormitories currently under construction to be completed more rapidly. But Condition 9(e) clearly serves two functions that advance the District's goals. First, it strengthens the university's incentive to comply with the housing provisions. Second, even though the new non-housing construction that Condition 9(e) holds hostage may not relate directly to new housing demands (e.g., new labs replacing old ones do not necessarily meet needs generated by *increased* students), the condition as a general matter keeps housing and non-housing growth proceeding in parallel.

The district court also found a constitutional flaw in Condition 10, which requires freshmen and sophomores to live on campus "to the extent such housing is available." But as the District notes, it was the university that originally proposed this measure as an element of its campus plan. Normally, a party cannot attack its own proposed agency action, see, e.g., *St. Anthony Hosp. v. United States Dep't of HHS,* 309 F.3d 680, 696 (10th Cir. 2002), *Johnson*

v. INS, 971 F.2d 340, 344 (9th Cir. 1992), although presumably that concept would not apply where the proposal was closely tied to some other proposed action that the agency rejected. Here, there is no evidence of such close ties to any other specific condition not granted to the university. And, even apart from the university's self-contradiction, the condition seems readily to meet the latitudinarian standards of substantive due process. A city might reasonably consider the youngest college students to be the ones most likely to disturb residents in the surrounding communities, as well as most likely to need whatever shreds of parietal rules may subsist on campus.

Finally, the district court rejected Condition 9(f), which provides that the other provisions of Condition 9 are "integral, non-severable aspect[s] of the Board's approval of this application. If any [provision] . . . is declared void for any reason . . . no application for a special exception will be processed and no permit to construct or occupy buildings . . . may be issued." The university characterizes this provision as an unconstitutional incursion into the province of the judiciary, because it punishes the university for exercising its legal right to challenge invalid provisions. Under our conclusion here that no other provisions of the Order are void, however, we see no need to address a condition that would take effect only on the opposite contingency.

On its cross-appeal the university claims that the BZA Order infringed its First Amendment rights to academic freedom. It did this, in the university's view, by constraining its determinations of where to build dormitories, how much campus space to devote to dormitories and how many students to admit. In support it points to Justice Frankfurter's concurrence in *Sweezy v. New Hampshire,*

354 U.S. 234 (1957), saying that a university has the right to "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study." *Id.* at 263. But the university cites no case giving universities any special status vis-á-vis neutral, generally applicable zoning and land-use regulations of the standard externality-constraining type. Thus our case is wholly different from, for example, *Keyishian v. Bd. of Regents,* 385 U.S. 589, 603, 611 (1967), which found unconstitutional vagueness in a statute requiring removal of state university faculty members for "treasonous or seditious" utterances or acts, noting the university's place in the "marketplace of ideas." By contrast, the BZA Order merely requires the university to house its students in a way that is compatible with the preservation of surrounding neighborhoods.

The university also argues that the District's zoning regulations are facially unconstitutional under the equal protection element of Fifth Amendment due process because their requirement of two stages of approval imposes burdens on university landowners not imposed on similarly situated non-university actors. But GW acknowledges that universities do not constitute a protected class and so the legislation need only "classify the persons it affects in a manner rationally related to legitimate governmental objectives." *Schweiker v. Wilson,* 450 U.S. 221, 230 (1981). As universities are larger, make more intensive use of their land, and have greater spillover effects on neighboring communities than most other landowners, however, the District's legislative classifications meet this criterion.

Accordingly, the decision of the district court is reversed in so far as it found constitutional violations in the BZA Order and is otherwise affirmed.

So ordered.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring:

Although I concur in the judgment in this case, I believe the majority erroneously recognizes a constitutionally protected property interest where there is none. In doing so, the majority chooses not to embrace firmly, as I would, the substantial authority that employs the claim to entitlement approach, *see, e.g., Bituminous Materials v. Rice County,* 126 F.3d 1068, 1070 (8th Cir. 1997); *Gardner v. Baltimore,* 969 F.2d 63, 68 (4th Cir. 1992); *RRI Realty Corp. v. Village of Southampton,* 870 F.2d 911, 917 (2d Cir. 1989); Maj. Op. at 5, as the proper analytical method to determine if a constitutionally protected property interest exists in the land-use context.

The majority instead simply recognizes that two (at least) approaches exist to answer the question, concluding that under either GW has the requisite property interest. Maj. Op. at 5. But under the "majority" approach of the Second, Fourth, Eighth, Tenth and Eleventh Circuits, a landowner has a protected property interest in a favorable land-use decision only if a "statute or regulation places substantial limits on the government's exercise of its [land-use] discretion," *Bituminous Materials,* 126 F.3d at

1070.[1] Those courts follow the U.S. Supreme Court's guidance found in *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70, 576-77 (1972) ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."). At the same time, their approach uses a standard that properly "balances the need for local autonomy in a matter of paramount local concern with recognition of constitutional protection at the very outer margins of municipal behavior." *Gardner*, 969 F.2d at 69.

Using this approach, I would not recognize a constitutionally protected property interest in GW's expectation of a "special exception." Indeed, I find it impossible to conclude the zoning regulations under which the BZA "ordinarily must," *Stewart v. D.C. Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973), approve a special exception for a campus plan only if it determines that the proposed plan is "not likely to become *objectionable* to neighboring property" substantially limit the exercise of its discretion. D.C. MUN. REGS. tit. 11, § 210.2 (emphasis added); *see* D.C. MUN. REGS. tit. 11, § 210.1.

The majority finds sufficient constraint on the BZA's authority in the regulation's command that university use "'shall be permitted as a special exception' if the criteria for the exception are met." Maj. Op. at 7 (quoting D.C.

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[1] As the majority points out, the circuits vary in deciding how "severely official discretion must be constrained" in order to establish a property interest. Maj. Op. at 5. Even using the Eighth Circuit's approach, the one favored by the majority, *id.*, I would not conclude that GW has a constitutionally protected property interest.

MUN. REGS. tit. 11, § 210.1). But the crucial criterion upon which the BZA's decision depends is whether the proposed use is "objectionable," Maj. Op. at 7 – a criterion that requires the BZA to use its judgment in considering numerous factors. D.C. MUN. REGS. tit. 11, § 210.2 ("Use as a college or university shall be located so that it is not likely to become objectionable to neighboring property because of noise, traffic, number of students, or other objectionable conditions."). Heeding advice to hesitate before intervening in local land disputes,[2] I find only a minimal limitation on the Board's discretion that is far from a case where "the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured," *RRI Realty,* 870 F.2d at 918; *Gardner,* 969 F.2d at 68. In fact, the zoning authority has been given "wide discretion" in making its decisions; hence, no constitutionally protected property interest in the special exception exists. *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence,* 927 F.2d 1111, 1116 & n.3 (10th Cir. 1991) (where zoning authority's decision must be "reasonable" and reasonable decision under state law should consider factors such as "zoning and uses of properties nearby," "suitability of the subject property for the uses to which it has been restricted" and "extent to which removal of the restrictions will detrimentally affect nearby property," authority had sufficient discretion to checkmate

[2] *Gardner,* 969 F.2d at 67-68 ("[F]ederal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes."). *See also Village of Belle Terre v. Boraas,* 416 U.S. 1, 13 (1974) (Marshall, J., dissenting); *DeBlasio v. Zoning Bd. of Adjustment,* 53 F.3d 592, 605 (3d Cir. 1995) (McKelvie, J., dissenting); *Nestor Colon Medina & Sucesores, Inc. v. Custodio,* 964 F.2d 32, 45 (1st Cir.1992).

property interest). It is because GW does not possess a constitutionally protected property interest that I would reverse the district court to the extent it found otherwise.

For the foregoing reasons, I concur in the judgment reversing the district court and I otherwise fully concur in the majority opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE WASHINGTON UNIVERSITY	)	
Plaintiff,	)	
v.	)	Civil Action
DISTRICT OF COLUMBIA, *et al.*	)	No. 01-0895-LFO
Defendants.	)	

ORDER

(Filed Apr. 12, 2002)

For the reasons set forth in the accompanying Memorandum, it is this 12th day of April, 2002.

ORDERED: that plaintiff's cross motion for partial summary judgment [dkt. # 58] is granted in part and denied in part, and defendants' cross motion for judgment on the pleadings, or in the alternative for summary judgment [dkt. # 61] is granted in part and denied in part. Specifically,

(1) The cross motions for summary judgment on Count I are DENIED without prejudice.

(2) The cross motions for summary judgment on Count II are DENIED without prejudice.

(3) Plaintiff's motion for summary judgment on Count III is GRANTED, and the defendants' motion for summary judgment on Count III is DENIED.

(4) The cross motions for summary judgment on Count IV are DENIED without prejudice.

(5) Defendants' motion for summary judgment on Count V is DENIED without prejudice.

(6) The cross motions for summary judgment on Count VI are DENIED without prejudice.

(7) Defendants' motion for summary judgment on Count VII is GRANTED, and the plaintiff's motion for summary judgment on Count VII is DENIED.

(8) The cross motions for summary judgment on Count VIII are DENIED without prejudice.

(9) Defendants' motion for summary judgment on Count IX is GRANTED, and the plaintiff's motion for summary judgment on Count IX is DENIED.

(10) Defendants' motion for summary judgment on Count X is GRANTED.

(11) Count XI delineates 42 U.S.C. § 1983 as the cause of action giving rise to plaintiff's constitutional and federal charter claims, but is not itself a substantive claim. Accordingly, defendants' motion for summary judgment on Count XI is DENIED as moot.

(12) Plaintiff's motion for summary judgment on Count XII is GRANTED, and the defendants' motion for summary judgment on Count XII is DENIED.

(13) Defendants' motion for summary judgment on Count XIII is DENIED.

It is further

ORDERED: that final judgment, pursuant to Fed. R. Civ. P. 54(b), shall be entered by the Clerk of Court on Counts III, VII, IX, X, and XII. In light of the time-sensitivity of this matter to both parties, and the centrality of the Counts on which summary judgment has been granted to both parties' arguments, there is no just reason to delay the entry of final judgment. It is further

ORDERED: that a status conference, to discuss continuing judicial administration of the remaining counts, shall be held on Wednesday, April 24, 2002 at 10:00 a.m. in Courtroom No. 3.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE WASHINGTON UNIVERSITY	)	
Plaintiff,	)	
v.	)	Civil Action
DISTRICT OF COLUMBIA, *et al.*	)	No. 01-0895-LFO
Defendants.	)	

MEMORANDUM

(Filed Apr. 12, 2002)

Plaintiff George Washington University ("GW" or "the University") has filed suit against defendants the District of Columbia, the Board of Zoning Adjustment ("Board"), and, in their official capacities, Mayor Anthony Williams and Board members Robert Sockwell, Anne Renshaw, Sheila Cross Reid, and Carol Mitten. The University is seeking relief from the Final Order on Remand ("Final Order") issued by the Board. In its complaint and cross-motion for partial summary judgment, GW raises a variety of constitutional and federal statutory challenges to aspects of the Final Order. Defendants have moved for judgment on the pleadings or, in the alternative, for summary judgment.

Revised Conditions 9(a)-(c) of the Board's Final Order require GW to acquire in the next six months additional housing for more than 1500 new student beds located either on-campus or outside the adjacent Foggy Bottom/West End neighborhoods – despite the fact that University-owned housing, off-campus but within the immediate Foggy Bottom/West End neighborhoods already

contains 1400 of the 1500 student beds required of it by the Final Order, and despite the fact that the University is in the process of adding at least 900 student beds on-campus in the next four years and plans to add in excess of 1500 over the next ten. A careful review of the record before the Board persuades me that this requirement is unconstitutionally arbitrary and capricious and devoid of connection to a legitimate government interest. Revised Conditions 9(e)-(f) and 10 partake of similar defects.

I.

District of Columbia zoning regulations require colleges and universities located in residential neighborhoods (including GW) to submit to District zoning authorities[1] for their approval a 10-year campus plan which describes all current campus facilities and any plans for future land development on-campus. *See* 11 DCMR §§ 210.4, 507.3. The University must thereafter apply to zoning authorities for "special exceptions" to its plan, which must be approved before the University can embark on specific land development projects. *See* §§ 210.4, 507.1, 507.8. In approving a campus plan or special exceptions, the Board's function is to determine, *inter alia*, that such development "is not likely to become objectionable to neighboring property because of noise, traffic, number of

[1] At the time GW submitted its campus plan for approval, authority was vested in the Board of Zoning Adjustment. On December 8, 2000, the D.C. Zoning Commission was given responsibility for review and approval of campus plans filed from that date forward. *See* 47 D.C. Reg. 9725 (Dec. 8, 2000). For the purposes of this litigation, the Board remains the relevant decision maker.

students, or other objectionable conditions." *See* 11 DCMR §§ 210.2, 507.7, 507.8. The source of the current litigation is GW's effort to obtain Board approval of its 2000-2010 campus plan. The University filed its initial application in December 1999, followed by a revised application in April 2000. After several public hearings and meetings, the Board approved the campus plan, subject to certain conditions set forth in its March 29, 2001 order ("Original Order").

On April 25, 2001, GW filed a complaint seeking injunctive and other relief from some of the conditions imposed by the Original Order, particularly Condition 9, which capped the number of undergraduate students GW could enroll until the University was capable of housing 70% of its full-time undergraduates on campus, and prevented the University from applying for any development permits for non-residential projects until it had met that 70% goal.

A June 15, 2001 Order granted the University's motion for a preliminary injunction, holding that GW had shown a substantial likelihood of success on the merits in establishing that "aspects of Condition 9 are so arbitrary and capricious as to violate the plaintiff's right to substantive due process." June 15, 2001 Mem. at 4 (citing *Village of Arlington Heights v. Metropolitan Hous. Devel. Corp.*, 429 U.S. 252, 263 (1977)). The cap on enrollment, which was imposed in the midst of the admissions process for the incoming freshman class, afforded GW no reasonable opportunity to comply with the Board's order. The moratorium on the University's application for *non*-residential development permits until housing had been provided for 70% of undergraduates lacked any legitimate connection

to the goal of increasing the number of undergraduates housed on campus.

The June 15 Order reflected a preference that this local zoning matter be resolved by local courts. Accordingly, a condition of the preliminary injunction required the University to seek parallel equitable relief in the D.C. Court of Appeals. Over GW's objection, that court remanded the matter to the Board. Upon reconsideration, on December 21, 2001, the Board issued a "Final Order on Remand," re-approving the campus plan,[2] again subject to certain conditions. GW is currently challenging the Board's Final Order, raising a variety of constitutional objections to Revised Condition 9, as well as Conditions 8 and 10. GW also challenges Condition 15 as a violation of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g.

Revised Condition 9 mandates that the University provide 5600+ beds for full-time undergraduates,[3] either on-campus or outside of Foggy Bottom/West End, no later than August 31, 2002. After August 2006, the required number of beds must be provided solely on-campus. *See* January 23, 2002 Order at 20-21. The University is required to conduct a semi-annual census of student

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[2] The Board issued a corrected version of the Final Order on January 23, 2002.

[3] The 5600 figure represents a "soft cap" – the number is 70% of a base enrollment of 8000, and GW must provide an additional bed for every full-time undergraduate enrolled in excess of the base number. For example, if GW were to enroll 8100 full-time undergraduates for the 2002-2003 academic year, the University would be required to supply 5700 beds.

enrollment and housing that will serve as the basis for determining its compliance with Revised Condition 9. In the event GW is not in compliance, "[n]o special exception shall be granted and no permit to construct or occupy buildings for nonresidential use on campus may be issued." *Id.* at 21. Finally, Revised Condition 9(f) states that no applications for special exceptions or permits to occupy or construct buildings for nonresidential use on-campus will be processed or issued if any portion of Revised Condition 9 "is declared void for any reason by any court in any proceeding," except at the Board's express order. *Id.*

Condition 8, incorporated by reference and without change from the Original Order, limits GW's "headcount" to no more than 20,000 students at any one time. Also under this provision, the number of full-time faculty and staff may not exceed 1,550 and 9,000, respectively. *See* March 29, 2001 Order at 14.

Condition 10, also incorporated by reference and without change from the Original Order, requires GW to house all full-time freshmen and sophomores in University housing on-campus, with exemptions permitted for students who commute, are married and/or have children, have religious beliefs inconsistent with dormitory life, or are disabled. *See id.* at 14-15.

Further, Condition 15(e), incorporated by reference and without change from the Original Order, tasks the University registrar with maintaining a record of students' license plate numbers and directing students to register their vehicles in the District or obtain a reciprocity sticker. GW is required to consult with the D.C. Department of Motor Vehicles to ensure student compliance. *See id.* at 16.

Meanwhile, the University has plans, acknowledged by the Board with approval or reflected in the overall campus plan at issue here, to build on-campus residential housing over the course of the ten-year campus plan well in excess of the Board's 5600+ bed requirement. In August 2001, the University applied for special exceptions to build a 200-bed dormitory and a 700-bed dormitory on-campus, on Squares 57 and 43, both of which are expected to be complete by August 2004. *See* January 23, 2002 Order at 3. The University is also attempting to obtain approval to add an additional 200 beds as part of a previously approved planned unit development on Square 122, which the Board would permit to be counted towards the 5600+ bed requirement. *See id.* at 3, 20. If approved, this would give GW 5200 on-campus beds by the 2004-2005 academic year. In its Final Order, the Board "reasonably concluded" on the basis of the University's testimony and record evidence that GW has the ability to construct sufficient new on-campus housing to provide a total of 6189 beds by 2006, barring unusual delays, "more than enough to satisfy Condition 9." January 23, 2002 Order at 17; *see also* March 29, 2001 Order at 4 (GW's proposed campus plan calls for at least 1350 new on-campus beds, in addition to the 900 beds currently in progress).

II.

Before reaching the merits of the cross-motions for summary judgement,[4] the abstention issues raised by the

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[4] Defendants' motion will be treated as a motion for summary judgment, because it presents "matters outside the pleadings." Fed. R. Civ. P. 12(c). Consideration of the administrative record alone would

(Continued on following page)

parties and the Court require attention. Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Nonetheless, doctrinal exceptions to this obligation exist, and defendants urge abstention on the authority of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The Supreme Court has distilled *Burford* abstention into two circumstances where a federal court must refrain from review of state agency action:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989) (*quoting Colorado River*, 424 U.S. at 814).

Here, the two prerequisites for *Burford* abstention are lacking. "Timely and adequate" review in the D.C. Court of

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not trigger Rule 12(c)'s conversion requirement, *see Lenox Hill Hosp. v. Shalala*, 131 F. Supp. 2d 136, 140 n.4 (D.D.C. 2000), but defendants have attached several other exhibits to their motion that the Court has reviewed and taken into account.

Appeals is not available, because that court does not provide an adequate forum for GW's constitutional and federal statutory claims. Additionally, GW's complaint seeks legal as well as equitable relief.[5]

Although zoning and land use policy may be of paramount concern to local authorities, our Court of Appeals disfavors *Burford* abstention and has refused to apply the doctrine in this context. "Federal courts routinely decide local matters of great sensitivity and we are not convinced that abstention from a federal question case may be based on this rationale." *Silverman v. Barry*, 727 F.2d 1121, 1123 (D.C. Cir. 1984) ("*Silverman* I") (rejecting *Burford* abstention in land-use litigation). The second *Burford* consideration requires a federal court to strike a balance between the strong federal interest in having certain rights, particularly constitutional rights, adjudicated in federal court, against a state's interests in maintaining uniform judicial treatment of local issues – a balance that "only rarely favors abstention." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996). The balance here favors the exercise of this Court's jurisdiction.

On its own initiative, this Court requested that the parties discuss the applicability of abstention, or more properly deferral, as addressed in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). "*Pullman* deferral recognizes that federal courts should not prematurely resolve the constitutionality of a state statute."

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[5] In a lawsuit where a plaintiff seeks legal as well as equitable relief, a federal court may stay proceedings, but may not abstain from exercising its jurisdiction. *See Quackenbush*, 517 U.S. at 728.

Growe v. Emison, 507 U.S. 25, 32 (1993). *Pullman* contemplates that a federal court should stay its hand if the complaint presents a question of constitutional law that could be mooted or narrowed by a state court's resolution of an unsettled state law issue. *See, e.g., The San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998). Here, GW is alleging in federal court that the "arbitrary and capricious" nature of the conditions imposed by the Board violate the constitutional guarantee of substantive due process, while at the same time challenging the Final Order in the D.C. Court of Appeals as violative of the District's Administrative Procedure Act, which looks at whether an agency's "action or findings and conclusions" are "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." D.C. Code § 2-510(a)(3). A finding by the D.C. Court of Appeals that the Final Order, or the Board's action in promulgating it, was arbitrary and capricious would eliminate the need for this Court to assess whether the alleged arbitrariness and capriciousness of the Final Order also rise to the level of a constitutional violation.[6]

However, the issue facing the D.C. Court of Appeals does not appear to be an unsettled question of state law the Administrative Procedure Act is frequently interpreted – but rather a case-specific question of how to apply well-settled law to particular facts. Where there is "no ambiguous question of local law whose resolution might modify or moot the due process claims presented here," *Silverman* I,

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[6] The D.C. Court of Appeals is the exclusive forum for judicial review pursuant to the D.C. Administrative Procedure Act. *See* D.C. Code § 2-510.

727 F.2d at 1123, n. 4, a federal court's abstention, or, in this case deferral, on the authority of *Pullman* is not an option.

III.

GW has moved for partial summary judgment on Counts I and II (takings), Counts III, IV, and XII (substantive due process), Counts VI, VII, and VIII (equal protection), and Count IX (academic freedom). The University also seeks a declaratory judgment that Conditions 8, 9, and 10 of the Final Order are unconstitutional, as well as a permanent injunction against enforcement of these conditions. These counts and conditions are discussed in Section IV, *infra*. Defendants have moved for summary judgment on all thirteen counts in the amended complaint. As the following analysis explains, defendants are entitled to summary judgment on Counts VII, IX and X.

A. Count VII: Facial Challenge to University-Specific Zoning Regulations

Count VII is a facial challenge to the District's regulation of colleges and universities, alleging that zoning requirements related to periodic campus plans and the necessity of applying for special exceptions for specific on-campus projects place more exacting standards on educational institutions than on similarly situated land users, such as commercial developers, contrary to the

constitutional guarantee of equal protection.[7] "'A facial challenge . . . is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.'" *MD/DC/DE Broadcasters Ass'n v. FCC*, 253 F.3d 732, 736 (D.C. Cir. 2001) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). That principle applies to regulations as well as legislation. *Id.* In order to prevail, GW must establish that the zoning regulations it challenges are unconstitutional in all circumstances. It has not done so.

"Under rational-basis review, where a group possesses 'distinguishing characteristics relevant to interests the State has the authority to implement,' a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Board of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 366-367 (2001) (quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985)). "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Garrett*, 531 U.S. at 367.

As the defendants point out, colleges and universities possess unique characteristics that justify a differentiated zoning scheme. Colleges and universities are among the largest landholders in the District and their campuses

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[7] The Fourteenth Amendment's equal protection clause applies only to states, but the due process clause of the Fifth Amendment imposes the same equal protection requirements on the federal government and the District of Columbia. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).

tend to spread over large, contiguous areas. Defendants state without material contradiction that the impact on neighborhoods of college and university campuses is therefore more substantial than the impact caused by other land users, who typically occupy discrete parcels of land in the city, rather than several sites and several acres. Colleges and universities also make a relatively intensive use of land. Their student populations are present on campus beyond normal business hours, in contrast to the population of a commercial office building, and students also move on and off campus every academic year, in contrast to the less transient population in other high-density residential dwellings.[8] District zoning laws also provide exemptions for colleges and universities that are not available to private landowners. These distinctions provide a rational basis for the District's imposition of unique regulatory requirements on colleges and universities, and entitle defendants to summary judgment on Count VII.

B. Count IX: Academic Freedom

In Count IX, the University alleges that provisions of the Final Order – by capping student enrollment and the number of its faculty, interfering with GW's ability to admit academically qualified undergraduates who are

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[8] Defendants also point out that colleges and universities may locate in commercial districts as a matter of right, and that the campus plan and related regulations apply only to universities located in areas zoned as residential or special purpose. *See Spring Valley Wesley Heights Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 644 A.2d 434, 435 (D.C. 1994) (citing 11 DCMR § 701.6(f)).

unsuited for dormitory life, and placing a moratorium on the construction of non-residential buildings if the University is unable to supply the number of beds required by the Final Order – violate its First Amendment right to academic freedom. The University's conception of academic freedom goes beyond the outer reaches identified and accepted by the courts. *See, e.g., Board of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 237 (2000) (Souter, J., concurring) ("Our understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach."). The zoning restrictions imposed by the Board only affect the number of student and faculty and where students may live.

Even if the Court assumes *arguendo* that Condition 9(e), which places a moratorium on non-residential construction, will preclude GW from building necessary academic facilities, that preclusion would only limit the University's freedom as to where its classrooms are located, rather than the content (the "how and what") of what is taught. Defendants' motion for summary judgment on Count IX is granted.

C. Count X: Violation of the University's Federal Charter

GW alleges a violation of its federal charter in Count X. A University's charter sets forth its educational mission and may establish mechanisms for internal governance of university affairs. *See In re Antioch Univ.*, 418 A.2d 105, 113 (D.C. 1980). It does not create a cognizable cause of

action. Rather, "[t]he granting of a corporate charter is ministerial governmental action and does not involve the Government to any significant degree in either the management or the promotion of a chartered corporation." *Greenya v. George Washington Univ.*, 512 F.2d 556, 559 (D.C. Cir. 1975). It does not follow from the federal government's chartering the University that the charter creates a federal cause of action by which GW may challenge any restrictions by a local government agency on "all powers necessary, incidental and convenient" to its educational mission. Summary judgment will be granted to defendants on Count X.

IV.

In the majority of the remaining counts in the amended complaint, GW objects to multiple aspects of Revised Condition 9 and Conditions 8 and 10 under a variety of constitutional theories pled in multiple counts.[9] Rather than discussing each count separately, each Condition will be discussed in turn.

A. Revised Condition 9

GW alleges that three aspects of Revised Condition 9 infringe on the University's right to substantive due

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[9] The University's only remaining non-constitutional count, Count XIII, alleges the Final Order violates the Family Educational Rights and Privacy Act. That claim is discussed *infra* at IV.D. Count XI alleges violation of 42 U.S.C. § 1983, but the University's opposition brief clarifies that Count XI is merely a vehicle by which GW is bringing its constitutional claims, rather than an independent legal claim. *See* Pl. Opp. at 27.

process. First, Count III of its amended complaint alleges that aspects of Revised Condition 9(a)-(c), which mandate that the University provide a certain number of beds for students, on-campus or outside of the neighborhood by August 2002, and solely on campus by August 2006, lack a rational connection to any legitimate governmental goal. Also, Count III raises a substantive due process challenge to Revised Condition 9(e), which prevents GW from obtaining any special exceptions or building and occupancy permits and allows the revocation of existing exceptions and permits should the Board determine that GW has failed to comply with the Board's student housing relocation order. Finally, Court [sic] XII invokes the due process clause and the concept of separation of powers to challenge Revised Condition 9(f), which would freeze the processing and issuance of special exceptions and construction and occupancy permits for all of the University's non-residential projects in the event that any provision of the condition is struck down by any court, presumably including this one. For reasons discussed in detail below, these aspects of Revised Condition 9 are constitutionally deficient. Accordingly, plaintiff's motion for partial summary judgment on Counts III and XII will be granted.

GW also argues, in the alternative, that the substantive provisions embodied in Revised Condition 9(a)-(c) effect an unconstitutional taking (Counts I and II), deny the University equal protection of the law (Count VI), and violate GW students' right to equal protection (Count VIII). GW further contends that the enforcement mechanism, Revised Condition 9(e), is a violation of procedural due process (Count V). Because these aspects of Revised Condition 9 are invalid on the foregoing constitutional grounds, it is not necessary to reach the merits of these

alternative constitutional theories. Summary judgment on these counts will therefore be denied without prejudice as to both parties.[10]

The Supreme Court has repeatedly emphasized that "'[t]he touchstone of due process is protection of the individual against arbitrary action of government,' whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-846 (1998) (internal citations omitted).

The defendants argue that the latter circumstance is a denial of substantive due process only if the government's action "shocks the conscience." While that exacting standard applies to challenges to the actions of individual officials, legislative acts violate the guarantee of substantive due process if they are "arbitrary and irrational," without more. *Eastern Enters. v. Apfel*, 524 U.S. 498, 537 (1998) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976));[11] *see also Lewis*, 523 U.S. at 846.[12]

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[10] GW did not address Count V in its motion for partial summary judgment.

[11] In *Apfel*, the Supreme Court noted that its "analysis of legislation under the Takings and Due Process Clauses is correlated to some extent," 524 U.S. at 537, but declined to reach the question of whether the legislation at issue, which was economic in nature, violated substantive due process as well as the takings clause.

[12] Our Court of Appeals, however, has specifically held that "the requirements of the takings clause cannot be said to exhaust the Fifth Amendment's substantive protection of property rights from government impositions," permitting consideration of GW's substantive due process claims independently of its takings claims. *See Tri County Indus., Inc. v. District of Columbia*, 104 F.3d 455, 458 (D.C. Cir. 1997).

Defendants concede that the Board's order should be treated as a quasi-legislative act. *See* Def. Mot. at 23. Zoning restrictions are reviewed for rationality, requiring, to pass muster, only a reasonable connection between the zoning authority's legitimate ends and the means used to achieve them. *Cf. Village of Arlington Heights*, 429 U.S. at 263 (recognizing a "right to be free of arbitrary or irrational zoning actions"); *see also Curto v. City of Harper*, 954 F.2d 1237, (6th Cir. 1992) ("Under this analysis, an ordinance or regulation is invalid if it fails to advance a legitimate governmental interest or if it is an unreasonable means of advancing a legitimate governmental interest.").

In order to succeed on a substantive due process claim in this Circuit,

> [A] plaintiff must at least show that state officials are guilty of grave unfairness in the discharge of their legal responsibilities. Only a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief. . . . Inadvertent errors, honest mistakes, agency confusion, even negligence in the performance of official duties, do not warrant redress under this statute.

Silverman v. Barry, 845 F.2d 1072, 1080 (D.C. Cir. 1988) ("*Silverman* II").

This standard imposes a heavy burden, but it is one that the University has met. The Board's Final Order seeks to achieve a legitimate governmental objective: "the livability and stable residential character" of the Foggy Bottom and West End neighborhoods. *See* January 23,

2002 Order at 5. However, the means employed by the Board to achieve those objectives have no rational connection to those legitimate goals.

It is undisputed that GW has accelerated its plans to construct on-campus dormitories. The University has applied for special exceptions to construct two on-campus dormitories with space for 900 student beds that are expected to be ready for student occupancy by the 2004-2005 academic year. *See id.* at 3. The University is also seeking to modify a previously approved planned unit development to include an additional 200 beds. *See id.* If the applications and construction are not delayed, these dormitories-in-process in the next two to three years will increase the stock of on-campus housing to more than 5200 beds, significantly alleviating pressure on the surrounding residential neighborhoods.

Despite these existing efforts by GW, which would substantially fulfill the Board's housing requirement within a realistic time period, the Order arbitrarily forces the University before August 2002 to go to great effort and expense to provide additional housing for 1500 undergraduates, for most of whom it has already lawfully provided housing. In addition, the Order would freeze the University's ability to obtain any permits or special exceptions for the construction or occupancy of non-residential buildings on its campus as a sanction should the University disobey the Board's housing limitation, or as a palpably irrational consequence if GW were able to persuade any court that provisions of the Final Order are unconstitutionally arbitrary and capricious, or otherwise illegal. Thus, if Condition 9(a)-(c) remains in force, the University faces a choice of damaging evils: it must either on short notice buy or rent additional housing outside of

Foggy Bottom for 1500 students' beds, leaving vacant either its residential dormitory space in Foggy Bottom or its newly acquired housing, in order to comply with the Final Order, or abandon its program for on-campus construction of non-residential space until its existing plans to construct additional dormitory space on campus come to fruition and eventually enable it to come into compliance with the Final Order.

1. Revised Condition 9(a)-(c): Exclusion of Existing Off-Campus Dormitories

Revised Condition 9(a)-(c) of the Board's Final Order requires GW to provide housing for 5600+ students on-campus or outside of Foggy Bottom by August 2002. Currently, GW has 4120 beds on-campus for its full-time undergraduates, leaving it approximately 1500 beds short of the Board's mandate. *See* Donnels Decl. at ¶ 3.[13] GW also has more than 1400 beds in buildings, located within Foggy Bottom/West End but outside the campus boundaries, that it currently uses by right as dormitories.[14] There is no dispute that GW's use of these beds for student housing is permitted by the zoning regulations. *See* March 29, 2001 Order at 9 (student housing is a use "permitted

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[13] The Board made a factual finding that GW had 4108 beds on-campus, an insignificant twelve-bed discrepancy. *See* January 23, 2002 Order at 3, ¶ 8.

[14] 453 beds in the Hall on Virginia Avenue, 219 beds in The Aston, and 536 beds in City Hall. *See* Pl. Opp., Ex. 1. The University leases an additional 189 beds in the Pennsylvania House, but in its proposal to the Board, GW specifically excluded Pennsylvania House from counting towards its housing requirement. *See* R. 4012.

by the Zoning Regulations."); *see also* 11 DCMR § 3104.4. Nonetheless, the Board refuses to credit these beds towards the University's 5600+ housing requirement.

If GW is not given credit for these existing off-campus facilities, it will need to fill the 1500+ gap by leasing or purchasing additional facilities off-campus and outside of Foggy Bottom, because the dormitories currently under construction on-campus will not be available as student residences until at least the 2004-2005 academic year. *See* January 23, 2002 Order at 6.

The Board disparages this obvious anomaly, claiming that acquisition of 1500+ beds on-campus or outside of Foggy Bottom/West End by August of this year is "not an onerous requirement," because the University was previously able to acquire 709 beds in less than a year by leasing City Hall and the Pennsylvania House. January 23, 2002 Order at 6,18. However, simply because the University has in the past been able to scramble to find housing needed for additional students does not justify governmental action forcing the University to go to similar effort and expense to find twice as many beds that are unneeded.[15]

The Board's judgment, that GW can acquire housing for twice as many beds in half the time, is unsupported by

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[15] As of March 18, 2002, GW had assigned housing for the 2002-2003 academic year to the 3820 rising seniors, juniors, and sophomores who desire to live in University housing. Although incoming freshmen have not been assigned housing, GW believes its remaining beds will be adequate. Only a small number of students, approximately one hundred, are on a voluntary waiting list for University housing. *See* March 26, 2002 Declaration of Robert Chernak.

the record and contradicted by the testimony of Charles Barber, the University's general counsel. In a series of hearing [sic] conducted by the Board, Barber repeatedly and consistently represented that the University's ability to meet an obligation to provide housing for 70% of its undergraduates in the short-term, and certainly by August 2002, was premised on inclusion of existing off-campus dormitories in Foggy Bottom. *See* R. 3557, 3649, 3657, 3852.

The requirement that the University obtain such a significant amount of housing outside of the neighborhood, in addition to the unreasonable burden it places on GW, is also contrary to legitimate zoning objectives, including the preservation of other residential neighborhoods outside of Foggy Bottom/West End and alleviation of traffic and parking congestion. *See* 10 DCMR § 210.5 (vesting zoning authorities with discretion to approve off-campus "interim use of land or improved property" but only "[w]ithin a *reasonable* distance of the college or university campus." (emphasis added)). The Board turns this regulation on its head, seeking to prevent the University from using existing facilities within walking distance of campus to count towards its housing requirement, and instead forcing GW to provide additional residential facilities in more distant parts of the city. The Board, which has a responsibility to the city as a whole, acknowledges that its orders "should not be instruments for exporting University housing into other neighborhoods in order to protect Foggy Bottom/West End," January 23, 2002 Order at 9, but implements an order that does precisely that for its first, four-year phase, even though already existing on-campus and off-campus dormitories, together with the University's

commitment for additional on-campus housing, *see supra* at 5, make such exportation unnecessary.

At the evidentiary hearings it conducted, the Board recognized that use of the off-campus dormitories is "the status quo in Foggy Bottom right now," and a proposal that credited beds in the Hall on Virginia Avenue and The Aston, but excluded City Hall and the Pennsylvania House from counting towards the University's housing obligation, would be "rather punitive in trying to protect the Foggy Bottom community." R. 4051, 4053.[16] Despite recognizing the punitive nature of its refusal to credit two of its four existing off-campus dormitories towards the University's housing requirement, the Board ultimately decided not to count any of the four buildings towards GW's undergraduate housing obligation, concomitantly increasing the number of duplicative housing for beds GW would need to acquire on-campus or outside of Foggy Bottom/West End.

The only justification that the Board provides for requiring the University to acquire 1500+ off-campus beds before the 2002-2003 academic year commences is a finding by the District's Office of Planning, adopted by the Board, that GW's expansion has brought the Foggy Bottom and West End neighborhoods "to the 'tipping point,' if not beyond." January 23, 2002 Order at 5. Although the Board "recognizes that the University needs time to construct dormitories on campus," it believed that its

[16] Commissioner Mitten and Chairperson Reid made these comments in response to a proposal by the Office of Planning, which would have permitted GW to provide housing on-campus or in a "housing opportunity area" that included The Aston and the Hall on Virginia Avenue. *See* January 23, 2002 Order at 8.

tipping point theory necessitated the "decisive step[ ]" of requiring GW to promptly acquire 1500+ additional beds off-campus. *Id.* As an afterthought, the Board seems to have included alleged student misbehavior as an additional justification for the immediate acquisition of 1500+ additional off-campus beds. Neither reason provides a rational underpinning for the Board's refusal in effect to credit existing space in the off-campus dormitories to allow GW to meet its housing obligation in the short-term as the University progresses towards a long-term solution through construction of additional on-campus housing.[17]

a. The "Tipping Point"

As of April 21, 2000, the Office of Planning issued a report indicating that "if the University continues to purchase land outside the campus plan boundaries and the number of students living in the small, constrained Foggy Bottom community continues to increase, the residential community will reach a 'tipping point' where the Foggy Bottom community simply transforms into a 'University area.'" March 29, 2001 Order at 6. Because that tipping point had not yet been reached, the Board concluded in its Original Order that GW had "met its

[17] In addition to these two reasons, the Board stated the conditions imposed by the Final Order were also justified "for the reasons given in the March 29, 2001 [*sic*] Order." January 23, 2002 Order at 5. The only reason given in the Original Order is a variant of the tipping point analysis, that insufficient on-campus housing and University expansion off-campus threaten the surrounding neighborhoods. *See* March 29, 2001 Order at 10.

burden of showing that the university use will not be objectionable to neighboring property." *Id.* at 10.[18]

In its Final Order, the Board concluded that "the University's aggressive expansion in to Foggy Bottom and the West End area has brought these areas to the 'tipping point,' if not beyond." January 23, 2002 Order at 5. However, requiring the University to effect the burdensome gesture of acquiring space for 1500 beds outside of Foggy Bottom/West End is not a rational device for bringing the neighborhoods back from the alleged tipping point, and the Board does not find to the contrary.

In the interim, even if the University's continued, by-right use of existing off-campus dormitories could reasonably be said to cause a deteriorating in the "livability and stable residential character," *id.*, of the Foggy Bottom and West End neighborhoods, the Board has provided no explanation why the acquisition of 1500 student beds in a more remote location would necessarily provide any relief. The Board does not require, because it cannot, that students vacate the existing off-campus dormitories in favor of more remote housing acquired by the University. *See id.*

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[18] The University was already operating the Hall on Virginia Avenue, purchased in May 1999, and The Aston, which it bought in July 1999, as dormitories before the Office of Planning issued its report warning that *continued* off-campus expansion by GW could bring the neighborhood to the tipping point. As noted above, *see*, n.17 & accompanying text, the Office of Planning proposal would have permitted GW to count existing beds in The Aston and the Hall on Virginia Avenue, indicating that the Office – which is a neutral government agency, rather than a party to the zoning proceedings – did not believe that student occupation of these buildings had caused the neighborhood to reach a tipping point.

at 15 ("Nothing in the Board's Order . . . can legitimately be construed to tell students where they can or must live."). The Board also does not require, again because it cannot, that GW cease and desist in its use of the four buildings as dormitories. "As for existing off-campus dormitories, the University will be able to use them for student housing or any other use permitted by the Zoning Regulations." *Id.* at 9. It is therefore difficult to discern any rational connection between the alleged problems in the neighborhood identified by the Board and its proposed solution. In the medium to long-term, the problem is solved by the University's construction of additional on-campus housing. But in the short-term, over the next four to six years, the obligation imposed by the Board on GW to acquire 1500+ beds outside of the neighborhood does nothing to alleviate the alleged pressure on Foggy Bottom and West End and does nothing to hasten on-campus residential construction.

The Board made certain findings that the conversion of hotels and other transient housing into dormitories, although perhaps not a factor in moving the neighborhood towards a tipping point by decreasing the stock of long-term residential housing, was nonetheless undesirable. *See id.* at 12. It is not necessary to consider the accuracy or reasonableness of those findings at this stage. Even if the court assumes the Board has identified a legitimate problem that may be addressed under the zoning regulations, its Order does nothing to replace hotels or non-student transient housing in Foggy Bottom, and may export the problem of conversion of hotels into dormitories (if indeed a problem) to other neighborhoods.

b. Student Behavior

The final order refers to "concentration of students" in leased buildings, including the Pennsylvania House and Columbia Plaza, that have "vexed elderly long-term residents *in those buildings*." January 23, 2002 Order at 5 (emphasis added). The only concrete instance of student misbehavior that the Board cited from the entire voluminous record is a case of "beer can bowling" in the Columbia Plaza apartment building. *See* January 23, 2002 Order at 12. There are generalized complaints about rowdiness, *see id.*, including noisy talking or shouting by students in the Pennsylvania House. *See* R. 3616. The record contains no evidence of neighborhood residents being disturbed by student misconduct in other buildings, and provides no foundation, on the basis of student misconduct or noise-related nuisance, for the Board to conclude that it would be reasonable have the University export student housing to other neighborhoods rather than crediting students already housed in off-campus dormitories towards the 5600+ bed obligation.

The Board also defends its exclusion of the off-campus dormitories by claiming that "[m]ore than 700 of the off-campus accommodations . . . were acquired after the Board clearly put the University on notice, in its March 29, 2001 Order (at 10-11), that the Board intended to prevent Foggy Bottom/West End from being forced to absorb additional dormitories." January 23, 2002 Order at 18. The Board conveniently ignores the fact that any notice provided by the Original Order in 2001 would not justify exclusion of the Hall on Virginia Avenue or the Aston, which were both purchased in 1999. Moreover, the thrust of the notice provided was that the Board would not allow "additional pressures on the permanent housing stock in the Foggy

Bottom/West End Area." March 29, 2001 Order at 11. As such, while the University was fairly placed on notice that it could no longer encroach on long-term residential units to provide student housing, nothing in the Original Order indicated that the Board would find the acquisition of transient housing – such as a hotel – to also have a detrimental effect on the neighborhood. Indeed, the order specifically admitted that it could not, as a matter of law, restrict the University's acquisition and by-right use of properties located outside of the campus boundaries. *Id.* at 12. To the extent that the Board is seeking to sanction the University for its failure to obey the Original Order, this is not a reasonable basis for declining to credit student beds in existing off-campus neighborhoods or requiring the acquisition of duplicate beds in other areas.

Even assuming that the Board is correct in concluding that the neighborhoods surrounding the University have been brought to the tipping point, the record does not reflect Board recognition of the critical fact that the process is already underway to draw back from the brink. The "high tide" in terms of the number of undergraduate students living off-campus likely has been reached, and that tide can be expected to naturally recede over the next several years as on-campus dormitories currently underway, as well as additional on-campus residential housing only in the nascent planning stage, become available for student occupancy – all without requiring the University to take expensive and virtually meaningless actions in the short-term.

2. Condition 9(e): Moratorium on Non-Residential Construction

The Court preliminarily enjoined the Board's Original Order in part because GW had demonstrated a substantial likelihood of success on the merits in its constitutional challenge to a nearly identical enforcement provision.[19] That provision, which precluded the University from applying for non-residential exceptions and permits until housing had been provided for 70% of undergraduates, "lack[ed] any demonstrated connection" to the goal of increasing the number of undergraduates housed on campus. June 15, 2001 Mem. at 6. The record and the rationale provided by defendants in their arguments make it apparent that defendants still cannot demonstrate any legitimate connection between a zoning condition related to on-campus residential housing and an enforcement mechanism tied to non-residential projects.

The record contains minimal discussion of Condition 9(e). The condition, as set forth in the Final Order, is a minor modification of a proposal by the Office of Planning: "If the University is found to be out of compliance with any condition contained in the order, the Zoning Administrator will be so notified and that no further processing of cases will be accepted for filing except for housing cases, and no pending cases will be allowed to proceed." R. 4035. In the Final Order, the enforcement mechanism is triggered only by failure to comply with the 5600+ bed obligation incorporated in Revised Condition 9. While the Office of

[19] Revised Condition 9(e) is essentially a rewording of Conditions 9 and 20 of the Original Order.

Planning's enforcement proposal would have frozen only pending and future special exceptions and permits, Condition 9(e) would also allow special exceptions and construction and occupancy permits that have already been issued to be revoked. *See* January 23, 2002 Order at 21.[20]

The Office of Planning representative shied away from using the term "punishment" to describe the proposal, but described it as an "enforcement mechanism that meets the infraction." R. 4035. The Board apparently selected a moratorium on non-residential projects as an enforcement mechanism because it anticipated the University would disregard a monetary fine as "a nominal cost of doing business." January 23, 2002 Order at 8. That conclusion is not based on any finding about GW's bad faith – in fact, the Board specifically stated it "anticipates that the University will comply with this Order in good faith," *id.* at 19, but rather on a comparison between the amount of the fine ($100,000) and the University's $781 million endowment. Moreover, the Board apparently believes that non-residential projects may "crowd out" residential construction, leaving no place for the necessary on-campus dormitories. *See id.* at 16. The Board bases this conclusion on inconsistent testimony given by GW in hearings related to the Original Order, on the one hand that campus planning was a "zero sum" game between academic and

[20] Defendants claim that GW exaggerates the potential impact of revocation of previously-issued special exceptions and building and occupancy permits, because Revised Condition 9(e) allows revocation only of those exceptions and permits issued pursuant to the 2000-2010 campus plan approved by the Final Order, rather than special exceptions and permits issued in connection with previous campus plans. *See* Def. Opp. at 24, n. 15.

residential buildings, and on the other hand that the campus was "not densely developed" and planned development projects still left the campus well below the maximum gross floor area limits proscribed by regulation. *Id.*

In justifying a moratorium on non-residential construction whenever GW has fewer than the required number of beds for its undergraduates, the Board claimed its intervention was necessary to ensure there is "remaining space on campus for student housing." *Id.* However, the Board contradicts this stated explanation in the preceding paragraph of its order, claiming there "is ample space for the construction of dormitories on the campus as currently designated." *Id.* More specifically, the University has earmarked certain sites on-campus as suitable for future residential development: Square 54, the site of the current hospital, which "[b]y itself is large enough to satisfy all of the University's housing requirements for the foreseeable future;" Square 103, which can support housing for at least 200 students; and Square 80, which could accommodate between 288 and 650 student beds. *Id.* at 6-7. The Advisory Neighborhood Commission for the Foggy Bottom and West End neighborhoods, ANC 2A, identified four additional sites as suitable for dormitories. *See id.* at 7. On this record, the Board cannot reasonably claim that non-residential development must cease if there is non-compliance with residential housing conditions in order to preserve the finite amount of space available for residential construction.

Moreover, Condition 9(e)'s stated purpose – to preserve land for residential use consistent with the campus plan – is rendered superfluous by the District's zoning

regime. By law, GW cannot proceed with any non-residential projects unless it obtains the necessary special exceptions, construction permits and occupancy permits. Under the governing regulations, the zoning authorities can deny any application for a special exception or permit if it is inconsistent with the approved campus plan. *See* 10 DCMR § 507.8. To the extent that the approved campus plan delineates certain parcels for residential development, and identifies those residential projects as "major new buildings," those sites "shall not be designated for or devoted to a different major new building until and unless the Commission has approved an amendment to the campus plan applicable to the site" 10 DCMR § 210.6. If the Board is truly concerned that individual non-residential projects may divert resources away from residential development, these regulations provide an existing mechanism to address their concern. Moreover, if the Board is truly motivated by a desire to focus the University's resources on the construction of on-campus housing, it is irrational for the Board to require GW to expend significant financial resources to procure housing outside Foggy Bottom for the 2002-2006 time period.

A blanket refusal by the Board, or other relevant decision makers, to "pre-freeze" approval of any special exceptions or permits sought by the University for non-residential projects, would be, in the circumstances presented here, unconstitutionally arbitrary and capricious and in contravention of existing zoning laws and regulations. District zoning authorities are required by law to consider a university's applications for a special exception. Zoning regulations require that the Board's successor, the Zoning Commission, "*shall hear and decide* all applications filed" by a university for, among other things, "the

further processing of an approved campus development plan to permit the construction and use of a specific building or structure within a campus." 11 DCMR 3035.1 (emphasis added).

Similarly, the District officials responsible for approval of construction permits "shall examine or cause to be examined all applications for permit[s] . . . within a reasonable time after filing." 12 DCMR § 112.1. Applications for certificates of occupancy, once filed, must be referred for inspection within five days; the inspector must examine the premises within fifteen days to determine if there are any violations of the building code and regulations that justify denial of the requested certificate. *See* 12 DCMR §§ 119.2.1-1192.2. A denial for any other reason would be unconstitutionally arbitrary and capricious. "If town officials refused to issue certificates of occupancy to [a] developer for a reason that was contrary to state law, such a refusal 'would constitute a deprivation of property without due process.'" *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84, 104 (2d Cir. 1992) (quoting *Sullivan v. Town of Salem*, 805 F.2d 81, 85 (2d Cir. 1986)). Additionally, previously issued building permits and certificates of occupancy may be revoked only for cause, which the regulations do not define to include failure to comply with campus plan conditions imposed by the Board. *See* 11 DCMR §§ 112.9, 119.4.

The Board may not place conditions on GW that are inconsistent with these regulations. *See Brady v. Town of Colchester*, 863 F.2d 205, 215-216 (2d Cir. 1988) ("[I]f the defendants had no authority under state law to revoke appellants' building permit . . . then a trier of fact could conclude that there was no 'rational basis' for the [zoning

board's] actions, and that, as a result, the [zoning board] violated appellants' rights to substantive due process.")

In addition to obliging the zoning authorities to consider the merits of a university's application for a special exception, the governing regulations also set forth permissible grounds for denial. University use of property in residentially-zoned or special purpose areas "shall be permitted" 11 DCMR §§ 210.1, 507.1, unless the zoning authorities make the specific determination that the proposed use is likely to become objectionable to the surrounding neighborhood for specifically delineated reasons, e.g., noise, traffic, or number of students. *See* 11 DCMR §§ 210.1-210.2; 507.7, 507.8. Denial for other reasons, such as a *de facto* denial due to a blanket bar on consideration of any application for a special exception, is beyond the Board's authority and implicates substantive due process concerns. "Denial of the permit is arbitrary where the official has limited authority and goes beyond that scope." *D'Ambra v. Providence*, 21 F. Supp. 2d 106, 109 (D.R.I. 1998); *see also Galland v. City of Clovis*, 24 Cal.4th 1003, 1035 (Cal. 2001) ("[R]efusal to issue clearly nondiscretionary permits is properly characterized as a deliberate flouting of the law."); *cf. Bellow v. Walker*, 840 F.2d 1124, 1129-30 (3rd Cir.1988) (denial of permit on the basis of partisan political or personal reasons unrelated to the merits of the application establishes a substantive due process violation).

Condition 9(e) aims to sanction GW if it falls short of the Board's 5600+ residential housing requirement, by placing a blanket prohibition on ongoing or future non-residential development, and penalizes the University even further by holding open the threat that any exceptions or permits previously issued under the campus plan

may be revoked. This enforcement provision not only exceeds the Board's authority; it also cannot be reconciled with the District's regulations governing the issuance of special exceptions and the issuance and revocation of building permits and certificates of occupancy.

3. Condition 9(f): Substantive Due Process and Separation of Powers

The June 15, 2001 Order granting GW's application for a preliminary injunction should have signaled to the Board that any linkage between GW's ability to comply with a requirement that it house a certain number of its undergraduates and its right to have its non-residential development permits processed was presumptively unconstitutional. *See* June 15, 2001 Mem. at 6. ("It is unreasonable to assume that limiting the plaintiff's ability to develop its own property for previously approved non-residential uses will cause the residential projects to be completed sooner."). Rather than accept this hint, the Board incorporated a virtually identical provision as Revised Condition 9(e) in its Final Order, and threatens to further sanction the University if it seeks judicial review through Condition 9(f).

The vice of this attempt to prevent judicial redress is that, to say the least, it bears "no relationship to any legitimate governmental objective." *Dominion Cogen v. District of Columbia*, 878 F. Supp. 258, 265 (D.D.C. 1995). There is no rational purpose for a provision that places a moratorium on non-residential projects, through a refusal to grant special exceptions or issue necessary permits, as a sanction for failure to provide the amount of undergraduate residential housing that the Board considers to be

required. *See supra* IV .A.2. An additional provision that results in the same objectionable outcome in the event the first provision is rejected by a court has an even more attenuated claim to being a rational, legitimate government action. The purported justification for Condition 9(f), to preserve the status quo in the event the existing campus plan in invalidated, is not credible. If GW attempts to go on a construction spree in the absence of a campus plan, the zoning authorities have adequate judicially enforceable tools, in their ability to deny special exceptions and permits on a case-by-case basis, on the merits of each application, to prevent this unlikely eventuality.

It is a core function of Article III courts to resolve any case or controversy about the constitutionality of government action, state or federal, and if necessary, fashion a remedy for government action detrimental to the Constitution. It is well-established that even Congress itself "clearly cannot define a constitutional right out of existence by preventing courts from crafting an effective remedy." *Gilmore v. California*, 220 F.3d 987, 1006 (9th Cir. 2000). Closer to home, and to the point, our Court of Appeals approved Congressional withdrawal of federal court jurisdiction over a dispute about a statute authorizing construction of a World War II monument on the Washington Mall, conspicuously noting that Congress had not attempted to bar judicial determination of the constitutionality of the legislation because Congress itself has no authority to do so. *See National Coalition to Save our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2002). The same principle invalidates Revised Condition 9(f), which, even if a court declared that Condition 9(e), sanctioning the University by "pre-freezing" its ability to obtain necessary

permits, was void, would sidestep that court order by imposing essentially the same restriction.

B. Condition 8

As a condition to approval of the campus plan, Condition 8 imposes limitations on student enrollment and the employment of faculty and staff. During the ten-year life of the plan, total student enrollment, including undergraduates and graduate students, both full- and part-time, may not exceed 20,000 at any one time. The number of full-time undergraduates and graduate students enrolled at any one time is not to exceed 16,553. *See* March 29, 2001 Order at 14. At the same time, the Condition bars GW from employing more than 1,550 full-time faculty, or 2,236 full- and part-time faculty, at any one time, and limits it to no more than 9,000 full-time staff employees, or 10,293 full-time and part-time staff. *See id.*

GW challenges these restrictions as unconstitutionally arbitrary and capricious in violation of substantive due process. The University's argument about Condition 8's student enrollment cap is not persuasive. The zoning regulations permit the Board to take into account the "number of students" as a factor in determining whether a university is likely to become objectionable to the surrounding neighborhood. 11 DCMR §§ 210.2, 507.7, 507.8. Any argument that the 20,000 figure is unreasonable or arbitrary is weakened by GW's acquiescence to an identical cap set by the campus plan in effect from 1985-2000, and its earlier representation to the Board that the cap should be continued. *See* R 3644 ("We have proposed not to

enlarge that [20,000 student] cap, but to continue that cap.").[21] The cap on the number of faculty and staff, in contrast, appears unrelated to any legitimate zoning objective. However, this issue is underdeveloped in the parties' briefs, leaving disputed issues of material fact that preclude granting summary judgment to either party on Count IV.

C. Condition 10

Condition 10 requires GW to house, by the beginning of 2002-2003 academic year, all non-exempt full-time freshmen and sophomore students "in University housing located within the campus boundary established by the Board." March 29, 2001 Order at 14. GW raises essentially the same constitutional objections to this Condition that it raises against Revised Condition 9.

GW does not object to the condition that freshmen and sophomores be required to live in university-controlled dormitories, and in fact originally proposed this condition, *see* March 29, 2001 Order at 4, but it does object to the caveat that these university-controlled dormitories be located exclusively within campus boundaries. It is undisputed that the Hall on Virginia Avenue is currently used as a freshmen dormitory, and has been configured so that it is suitable only for freshmen housing. *See* Donnels Decl. ¶ 6. But because it is located in Foggy Bottom outside the campus boundaries, it would not count towards GW's housing obligation under either Condition 9 or 10. For

[21] Testimony of Charles Barber, senior counsel, George Washington University Office of General Counsel.

substantially the same reasons discussed above, any condition that prohibits the University from using an existing, by-right dormitory to house freshmen or sophomores and forces the University to find substitute housing for these students in a distant location, at least until the University has had a reasonable period of time to complete its on-campus dormitory construction, would be an impermissible infringement on substantive due process rights under the holding in *Silverman*. The minimal objectionable impact, if any at all, of allowing freshmen to remain in the Hall on Virginia Avenue until suitable housing has been constructed within the campus boundaries does not provide a reasonable basis for Board [sic] to exclude beds in that dormitory from being credited towards the University's housing obligation.

D. Condition 15(e)

Condition 15(e) requires GW to maintain a record of the license plate numbers of vehicles kept by students. GW is also supposed to direct students to register their vehicles and obtain a reciprocity parking sticker in accordance with District law. To ensure student compliance, GW "shall consult with the D.C. Department of Motor Vehicles to determine whether such registration is completed or such stickers are obtained." March 29, 2001 Order at 16. GW argues that this condition violates the Family Educations Rights and Privacy Act (FERPA), by requiring disclosure of educational records in the form of names and license plate numbers of all students who own motor vehicles.

FERPA forbids the disclosure of "education records" without the student's consent. The Act defines "education

records" broadly, to include "'records, files, documents, and other materials' containing information directly related to a student, which 'are maintained by an educational agency or institution or by a person acting for such agency or institution." *Owasso Independent School Dist. v. Falvo*, 122 S. Ct. 934, - 937 (2002) (quoting 20 U.S.C. § 1232g(a)(4) (A)). The parties do not dispute that student names and license plate numbers, if maintained as a record by the University, would qualify as "educational records" under the Act. An educational institution that discloses information in violation of the Act risks loss of federal funds.

GW has not moved for summary judgment on this count, taking the position that there are outstanding issues of material fact. The defendants, in moving for summary judgment, offer several "what if" arguments: that FERPA may not create a private right of action;[22] that the required "consultation" may not require disclosure of education records; that even if "consultation" requires disclosure of education records, the information disclosed may be limited to students' names;[23] that students may choose to waive their FERPA rights;[24] and that FERPA

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[22] The Supreme Court declined to address the question of whether the Act creates a private right of action in *Owasso*, *see* 122 S. Ct. at 938, but will resolve that issue in an upcoming case. In the instant case, GW is not suing for damages under FERPA, but is rather seeking declaratory relief from a condition that it claims would force it to violate the Act's confidentiality provisions.

[23] Under FERPA, students' names are classified as "directory information," which may be released without the student's explicit consent. *See* 20 U.S.C. §§ 1232g(a)(5)(A), 1232g(b)(1)-(2).

[24] GW counters with a "what if" of its own: the possibility that some students may opt out of the Act's provisions allowing disclosure of

(Continued on following page)

may not apply, if the information is kept by campus police.[25] Defendants' arguments, rather than supporting their motion, confirm that material issues of fact preclude summary judgment, particularly regarding the nature of the "consultation" mandated by Condition 15(e). Accordingly, defendants' motion for summary judgment on Count XIII will be denied.

V.

As set forth in the accompanying Order, motions (including cross-motions) for summary judgment on Counts I, II, IV, V, VI and VIII are denied without prejudice; plaintiff's motion for summary judgment on Count III is granted; defendants' motion for summary judgment on Count VII is granted; defendants' motion for summary judgment on Count IX is granted; defendants' motion for summary judgment on Count X is granted; Count XI is not substantive and does not require disposition by the Court; plaintiff's motion for summary judgment on Count XII is granted; and defendants' motion for summary judgment on Count XIII is denied.

There is no reason to anticipate that the Board will act contrary to the foregoing rulings. Accordingly, the prayer for injunctive relief will be denied at this time, without prejudice to GW's application for such relief

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directory information, *see* 20 U.S.C. §§ 1232g(a)(5)(B), 1232g(d), thereby barring GW from disclosing even their names to third parties.

[25] Condition 15(e) specifies that GW will maintain the records "through its Office of the Registrar." However, the defendants' hypothetical highlights that any controversy over Condition 15(e) may be amenable to resolution through clarification, rather than litigation.

should the Board fail or threaten to fail to honor these rulings.

There is also no reason to anticipate that GW will not honor its commitment to construct, well before the expiration of the campus plan, additional on-campus dormitories with more than a sufficient number of beds to meet the Board's requirement. It is not necessary to reach the issue of whether the Board's conditions, or other like conditions, might be appropriate should the University disregard its responsibilities.

Nothing in this Memorandum or the accompanying Order implementing the decisions announced herein should be construed as precluding either party from seeking further judicial relief if circumstances change over the ten-year course of the campus plan.

DATED: April 12, 2002

/s/ Louis F. Oberdorfer
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The George Washington University, Plaintiff, v. The District of Columbia, et al., Defendants.	)	Civil No. 01-0895 (LFO)

ORDER

(Filed Jun. 15, 2001)

For reasons stated in the accompanying Memorandum, it is this 15th day of June, 2001, hereby

ORDERED: that plaintiff's motion for a preliminary injunction is GRANTED and that the defendants shall comply with the following terms of the injunction, subject to the conditions hereafter stated:

1. Defendants District of Columbia and Board of Zoning Adjustment ("Board") and all those acting in concert with them shall not enforce Condition 9 of the Board's March 29, 2001 Order with respect to the University's undergraduate enrollment for the academic year 2001-2002, or until further order of this Court.

2. Defendants are shall [sic] not enforce Condition 9's restriction on the University's privilege of filing any applications for special exceptions as defined by Condition 9 with the expectation that the defendant Board

will process the applications as rapidly as it would if there were no Condition 9.

It is hereby further

NOTED: that the granting and enforcement of this injunction is conditioned upon the following:

1. The University will determine as precisely as possible the number of "full-time undergraduates" (as that term is defined in Condition 9), enrolled at the commencement of the academic year 2001-2002 and shall report its determination (including identification by category of the number of students excluded from the category of "full-time undergraduates" in accordance with the definition in Condition 9) to the Court and the defendants on or before *September 30, 2001.*

2. The University shall use its best efforts to include in its claims that are the subject of its pending Petition for Review in the District of Columbia Court of Appeals a request for equitable relief of the same nature that it seeks in this Court, the defendants having undertaken to join with the University in a motion before the Court of Appeals for expedited consideration of that Petition.

It is hereby further

ORDERED: that, in light of the Court's findings of minimal injury that will be caused to the defendants by its compliance with this injunction, the plaintiff shall give security as required by Federal Rule of Civil Procedure 65(c) in the amount of $1,000.00; and it is further

ORDERED: that the University may file, on or before *July 13, 2001*, an opposition to any motion the defendants may file in response to plaintiff's complaint; and it is further

ORDERED: that defendants may, *on or before July 25, 2001*, file a reply to plaintiff's opposition.

/s/ Louis F. Oberdorfer
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The George Washington University, Plaintiff, v. The District of Columbia, et al., Defendants.	)	Civil No. 01-0895 (LFO)

MEMORANDUM

(Filed Jun. 15, 2001)

Plaintiff, the George Washington University, is before the Court seeking a preliminary injunction, which would preclude the enforcement of "Condition 9," a portion of the District of Columbia Board of Zoning Adjustment's March 29, 2001 Order approving the University's "campus plan." Condition 9 imposes a limit or cap on the number of full-time undergraduate students which the University may enroll at the number of students enrolled as of February 13, 2001, until the University is able to house 70% of its full-time undergraduates on campus. It also prohibits the University from seeking "special exceptions", or development permits, for non-residential development projects until the 70% goal is met. The University challenges this condition on numerous constitutional grounds in its papers and at an extensive hearing on June 12, 2001. The plaintiff made the requisite showing to support its motion for a preliminary injunction and the defendants have not effectively traversed it. Accordingly, an accompanying order grants that motion, subject to certain conditions.

I.

George Washington University was established by federal charter in 1821 thereby realizing a vision of George Washington himself. It has been located in D.C.'s Foggy Bottom neighborhood since 1912. The District's zoning laws require universities to operate pursuant to "campus plans" approved by the District of Columbia Board of Zoning Adjustment ("BZA" or "Board"). A campus plan generally outlines the proposed uses for the campus; a university must apply for a "special exception" in order to receive approval for any specific development project.

The University began putting together its proposed campus plan in late 1998 in anticipation of the expiration of the then-current plan in December 2000. It filed its new plan with the Board in December 1999. The proposal with respect to student housing drew expressions of concern from the neighborhood. During a meeting on February 13, 2001, the Board indicated that it would approve the University's plan, subject to a number of conditions, including a cap on future growth of the plaintiff's student body, at its level on that date. Its March 29, 2001 final order approving the plan stated:

> The Board concludes that the Applicant has met its burden of showing that the university uses will not be objectionable to neighboring property . . . . The Board concludes that both factors – the insufficient supply of on-campus housing and expansion of university use through off-campus acquisition – are likely to exacerbate objectionable impacts on neighboring property unless steps are taken to prevent that outcome . . . . As a condition of approval of the 2001 campus plan, the University must limit enrollment of full-time undergraduate students

> to that number enrolled as of February 13, 2001 ("benchmark enrollment") until the University has available on-campus housing in an amount that will house 70 percent of its undergraduate population.

Board Order, March 29, 2001, at 10-11 (Pl.'s Mem. Ex. A). The Order excludes from its definition of full-time students: part-time or evening students, married students or those with children, students with disabilities or religious beliefs inconsistent with dormitory life, and students who commute from outside D.C. Order at 14. Because the University has not historically maintained such statistics about its students, it contends that its allowed enrollment was frozen by the Board in the midst of the admissions process at a number that neither the University nor the Board knew, knows or can know, without additional data, difficult to obtain until registration of students in August 2001. The University filed the instant action on April 25, 2001. On April 30, 2001, it also filed a Notice of Appeal from the Zoning Board's Order invoking the D.C. Administrative Procedure Act with the D.C. Court of Appeals.

The University, as is typical of most institutions of higher learning, requires many months of lead time for the selection of students for each academic year. For the freshman class to enter in August of 2001 the University received applications for the early decision process until November 1, 2000, and extended offers based on those applications on December 15, 2000. Decl. of Kathryn Napper ¶ 5. It received applications for its second round of early admissions until January 15, 2001, and extended additional offers on February 3, 2001. On March 23, 2001, the University sent out offers to regular applicants, not

seeking early admission, with responses due by May 1, 2001. Napper Decl. ¶¶ 6, 8.

Thus, the University began, and was well along with, processing the class to enter in August 2001 when the Board established the February 13, 2001 cap. That process reflected an earlier University decision to accept 100 more freshmen entering in 2001 than in the previous year and to further adjust upward to compensate for the consequences of a possible slow-down in the economy. However, University officials did not know as of February 13 how many freshmen would actually accept and matriculate or how many upperclassmen would actually return for the forthcoming year. The University now (June 2001) estimates that "we will have at least 400 more freshmen in our freshmen class than last year." Transcript of June 12, 2001, Preliminary Injunction Hearing at 4; *see also* Supp. Decl. of Kathryn Napper ¶¶ 2, 4. If Condition 9 obtains, the University is likely to have to "disinvite" previously accepted students or violate Condition 9.

II.

To obtain a preliminary injunction, an applicant must establish: (1) a substantial likelihood of success on the merits; (2) irreparable injury in the absence of an injunction; (3) less injury to the non-moving party than the moving party if an injunction is ordered; and (4) that a preliminary injunction is consistent with the public interest. *Serono Labs., Inc. v. Shalala,* 158 F.3d 1313, 1317-18 (D.C. Cir. 1998).

Although the plaintiff claims that it is likely to establish that Condition 9 of the Order violates multiple constitutional provisions, it need only show a substantial

likelihood of success on one of its claims to satisfy that requirement for relief. The plaintiff has adequately demonstrated a substantial likelihood that aspects of Condition 9 are so arbitrary and capricious as to violate the plaintiff's right to substantive due process. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977) (noting the right to be free from arbitrary and irrational government decisions). To show a substantive due process violation in this context, a plaintiff must show that the actions of the Board are unsupportable on any rational basis. *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992); *see Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988).

The simple and decisive facts are that: Condition 9 sets an enrollment cap based on a number of students that is unknown and presently unascertainable. In defining full-time students, the Order excludes married students, those with children, those with religious beliefs that prevent them from living on campus, and those who commute from outside of the District of Columbia. The plaintiff does not maintain, and has demonstrated that it cannot obtain, *past* statistics that track those student characteristics, as of February 13, 2001, and thus does not know the number of students enrolled on February 13, 2001 who are to be considered full-time students for the special purposes of the enrollment cap. Furthermore, the cap was imposed after the admissions process for the class entering in August 2001 was in mid-stream. Thus, Condition 9 imposed conditions that could not be met and afforded the plaintiff no reasonable opportunity to come into compliance before the cap (whatever it was) went into effect. Condition 9 partakes of the essence of "arbitrary and capricious."

Finally, the Board conceded in Condition 9 that the University's proposed use was not then objectionable, but that objectionable impacts were *likely* if a cap were not imposed. The Board's findings suggest that its action was an attempt to alleviate future problems, not imminent ones. The imposition of a cap as of February 13, in light of the implication that there was no immediate crisis to justify such drastic action, is irrational, especially when considered in light of the fact that it is quite feasible for the University to gather the data necessary to reach a rational decision in August 2001, when students register for the upcoming academic year.

Significantly, the Board's Order also prevents the plaintiff from applying for approval of any *non-residential* development projects on campus until the 70% housing requirement is met. Defendants conceded at the hearing that the restriction on applications is only a means of enforcing the cap. But the restriction lacks any demonstrated connection to that goal. Plaintiff has indicated that it currently has approved plans for residential projects on campus that will be completed in 2 to 4 years. It is unreasonable to assume that limiting the plaintiff's ability to develop its own property for previously approved non-residential uses will cause the residential projects to be completed sooner.

The foregoing facts make it likely that plaintiff will prevail on its due process claim. In the time-sensitive circumstances present at this preliminary stage of the matter, it is unnecessary to address plaintiff's other constitutional claims. They may be addressed in connection with the permanent injunction.

In the absence of an injunction, the plaintiff faces severe and irreparable injury. It is in the untenable position of either beginning its academic year with enrollment in violation of the Board's Order, or withdrawing offers of admission to students previously admitted for the Fall of 2001. The potential damage to the plaintiff's reputation as an academic institution if, a few weeks before registration, it rejected several hundred previously admitted students is real and immediate, not to mention the impact on such rejected students, to whom the University has an obvious responsibility, particularly those who would have, for example, declined offers from other universities in reliance on the University's offers of admission.

The defendants counter with the suggestion that the Order is not directly enforceable and that the plaintiff would not be significantly damaged by simply violating it. Such a suggestion is, of course, untenable for a great university, particularly one originally conceived of by, and named for, George Washington. The defendants, on the other hand, can point to no injury, irreparable or otherwise, that they will suffer if the enforcement of Condition 9 is simply delayed to afford the parties an opportunity to devise a rational limit and to provide enough lead time to put it into effect consistent with the University's commitments to previously admitted students. This is particularly true in light of the Board's finding of *likely* objectionable impacts, as discussed above, rather than immediate ones.

The defendants argue that the University's injury is self-inflicted because it made offers of admission to its regular applicants on March 23, 2001, after it knew about the February 13, 2001 enrollment freeze. In the fall of

2000, the University's Board of Trustees set an enrollment goal of 150 more incoming freshmen for the fall of 2001 than had been enrolled in the fall of 2000. Napper Decl. ¶ 2. According to representations made by plaintiff's counsel at the June 12, 2001 hearing, the income expected from these additional students was calculated into the University's budget. The University commenced accepting students for the 2000-2001 academic year as early as December 15, 2000. Although it extended additional offers after the Board announced a cap but before its final Order was issued, it was unreasonable to require the University to derail a lengthy and complex admissions process that was well underway.

The public interest weighs in favor of issuing a preliminary injunction. The plaintiff is a federally chartered educational institution that contributes significantly to the District of Columbia, both financially and in reputation. The public has an interest in its reputation for integrity and fair dealing, and for its continued success as a premier university. Although the public also has an interest in the preservation of its neighborhoods in accordance with the goals of the D.C. Comprehensive Plan, a delay in enforcement of an enrollment cap does not materially implicate those interests.

* * *

There is also a related public interest, reflected in the concept of federalism, that a local zoning matter has a place in the local system of justice. *See, e.g. Younger v. Harris*, 401 U.S. 37 (1970). Apparently recognizing this, plaintiffs have filed in the District of Columbia Court of Appeals a parallel petition to review Condition 9. The accompanying Order implements that action by making it

a condition for the relief granted that the plaintiff also seek the equitable relief sought here in the District of Columbia Court of Appeals. If that court should grant that relief, its orders will be treated with all the deference that the doctrine of "abstention" will allow. *Cf. New Orleans Pub. Serv., Inc. v. Council of City of New Orleans,* 491 U.S. 350 (1989).

* * *

An accompanying Order implements the decisions announced herein.

DATE: June 15, 2001

/s/ Louis F. Oberdorfer
UNITED STATES
DISTRICT JUDGE

APPENDIX D

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

441 4th Street, N.W., Suite 210-S,
Washington, DC 20001 (202) 727-6311

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E

Application No. 16553E of the George Washington University, pursuant to 11 D.C.M.R. § 3104.1, for a special exception for the review and approval of the University Foggy Bottom Campus Plan – Years 2000-2010 under Sections 210 and 507.

HEARING DATES: April 26, 2000; September 13, 2000; September 26, 2000; September 17, 2001; and September 21, 2001

DECISION DATES: December 12, 2000; February 13, 2001; October 9, 2001; October 30, 2001; and December 11, 2001

FINAL ORDER ON REMAND

Following the Board's March 29, 2001, final Order in this proceeding, the University filed a petition for review with the District of Columbia Court of Appeals. It also filed a civil action in the federal district court against the Board, its members, the District of Columbia, and Mayor Anthony Williams. On June 15, 2000, the district court issued a preliminary injunction preventing enforcement of Condition 9 of the March 29, 2001, Board Order during academic year 2001-2002, or until further order of the court.

The Corporation Counsel then filed a motion in the District of Columbia Court of Appeals to remand the case to the Board for further consideration of the Board decision in light of the preliminary injunction. On July 31, 2001, the Court of Appeals remanded the case without limitation as to the scope of the remand proceedings.

On remand, the Board ordered the University to respond to a number of questions. It also urged the parties to attempt to settle their differences, failing which the Board would hold additional evidentiary hearings. When the parties reported that their negotiations were fruitless, the Board held evidentiary hearings on September 17 and 21, 2001. In addition to eliciting further evidence, the Board directed the parties to suggest their alternatives to Condition 9, if any.

Following the Board's approval of a proposed Order, the parties were given an opportunity to file exceptions. The Applicant, ANC2A, Foggy Bottom Association, Sol Shalit, and ANC Commissioner Maria Tyler filed exceptions. The Board modified this Order in light of these exceptions. Its explanation for approving some exceptions and for rejecting others appear [sic] in part III of this Order. The Board has also made a few formal changes on its own motion.

This Order on Remand is based on the entire record of this proceeding, both before and after remand. It incorporates and adopts the Board's March 29, 2001, Order. To the extent of any inconsistency between the findings, conclusions, and conditions contained in the two Orders, this Order supersedes the earlier Order.

I. Supplemental Findings of Fact.

1. On August 24, 2001, the University's full-time undergraduate enrollment was 7881. Tr. September 17, 2001, at 29; Exhibit 297, attachment 5-6.

2. As of September 21, 2001, the University's full-time undergraduate enrollment was 8044. Exhibit No. 320, att. 3. Of those students, the University estimated that 1239 were students who commuted from outside the District of Columbia, held religious beliefs or had disabilities inconsistent with dormitory life, were married, or had children. *Id.* The University testified that the number of commuters (829) was a verifiable number and the rest were reasonable estimates. Tr. September 21, 2001, at 21-23; Tr. September 17, 2001, at 80.

3. In addition to the 8044 full-time undergraduate students, the University had between 6000 and 7000 full-time graduate students enrolled for academic year 2000-2001. *Id.* at 170. The total student body for academic year 2001-2002 is approximately the same size as in 1985, between 17,000 and 18,000. Tr. September 17, 2001, at 17. During the period, the number of undergraduates has increased and the number of graduate students has decreased. Tr. September 17, 2001, at 16-17.

4. The full-time undergraduate enrollment as of September 2001 is substantially larger than in previous years (Exhibit 297, attachments 5 & 6):

Year	Enrollment
1998 (Fall)	6339
1999 (Fall)	6857
2000 (Fall)	7410
2001 (Fall)	8044

5. The increase in student enrollment resulted in part from a substantial increase in the size of the freshman class for academic year 2001-2002. The University attributed this increase to an unusually high registration rate by applicants who had been offered admission. Tr. September 17, 2001, at 19. At the same time, however, the University offered more admissions for the 2001-2002 academic year than for previous years. The rates of acceptance from 1998 to 2001 consistently were between 48% and 49%. As a result, as the number of applicants increased, the number offered admission increased almost proportionately (exhibit 297, attachment 1):

Year	Applications	Acceptances	Percentage
1998	12,754	6227	48.2%
1999	13,584	6633	48.8%
2000	14,105	6882	48.7%
2001	14,591	7072	48.4%

6. Only 9.1% of the freshman admissions (646 of 7072) for academic year 2001-2002 resulted from early admissions. Exhibit 297, attachment 3. The University freshmen admissions process varies only within a narrow range each year. "Early Decision I" offers are normally issued by December 15 with registration deposits due on January 15. *Id.* The timing of "Early Decision II" notifications varies. In 2000, those offers were issued on February 3 with registration deposits due March 3. *Id.* Regular admissions offers are generally mailed in the latter part of March, and deposits must be post-marked by May 1. That procedure was followed in 2001. Nevertheless, 54 freshmen were permitted to enroll after May 4. *Id.*

7. The admission of transfer students normally continues after the size of the freshman class is known. The University described the admission of transfer students as a "rolling process." Tr. September 21, 2001,

at 168. In 2000, the University admitted 94.6% of its transfer students (579 out of 612) between May 7 and August 13. Exhibit 297, attachment 2.

8. Increases in enrollment have not been accompanied by commensurate increases in on-campus housing. As of September 2001, the University had 4108 beds on campus for its 8044 full-time undergraduate students (51.1%). Exhibit 307. Of the 4108 beds, 190 were added after the Board's initial Order on this application, partly as a result of converting lounges and reconfiguring rooms in existing dormitories and partly through the Board's expansion of the campus boundaries to encompass additional University-owned property. Exhibit 296, attachments A-C.

9. Following the Board's March 29, 2001, Order, the University accelerated plans for providing more on-campus housing. In August 2001, the University applied for special exceptions to build a 700-bed dormitory on Square 43 and a 200-bed dormitory on Square 57. Tr. September 21, 2001, at 25. The University expects both to be completed in time for the 2004-2005 academic year. *Id.* at 102; Exhibit 296, attachment F. Once completed, they will increase on-campus beds to 5008.

10. The University explained that its acceleration of the Squares 43 and 57 projects is to provide "housing that we can control that's close to where our students go to school." Tr. September 21, 2001, at 53.

11. The University has applied to the Zoning Commission for modification of a previously approved planned unit development (PUD) on University-owned property in Square 122. The University application included plans for a 200-bed dormitory. Tr. September 17, 2001, at 25. If the PUD modification is approved and the project constructed accordingly, and if Square 122 were to

be included within the campus, the number of beds on campus available by the fall of 2004 would increase by 1100 to 5208.

12. The University testified that it is ready to commit funds to build additional dormitories on campus. Lack of money is not an issue. Tr. September 21, 2001, at 54-55.

13. Besides on-campus dormitories, the University owns or leases off-campus buildings that it uses as dormitories containing 1380 beds in 2001. All are located in Foggy Bottom/West End. Exhibit 296, attachments B-C.

14. The University leased two off-campus properties that it converted into dormitories during the summer of 2001 in response to the increased enrollment for academic year 2001-2002. The University leased the former St. James Hotel (24th St. and Pennsylvania Avenue, N.W.) for 15 years, renamed it City Hall, and provided accommodations for 543 undergraduates. Exhibit 296, attachment C. It leased 78 apartment units in 2424 Pennsylvania Avenue, N.W. (Pennsylvania House) for three years. That building had previously been used partly for long-term renters and partly for transients. The University is providing 166 beds in the 78 leased units. *Id.* The Board credits the testimony of James McLeod, a resident of 2424 Pennsylvania Avenue and a party to this proceeding, that the influx of students has made the building much noisier, seriously disturbing long-term residents, many of whom are elderly. Tr. September 17, 2001, at 107-108; Exhibit 306 at 4.

15. The University explained it had not leased property outside Foggy Bottom once it became aware that the 2001-2002 class would be unusually large because the University administration believes that students want

to live close to their school. Tr. September 21, 2001, at 197.

16. The University has a 28.55% limited partnership interest in Columbia Plaza, a multi-building 800-unit complex at 23rd Street and Virginia Avenue, N.W. Under the partnership agreement, the University is entitled to recommend University students for vacancies at Columbia Plaza. Tr. September 17, 2001, at 72. There was a dispute among the parties as to the number of students who now live there. The Board credits the University's statement that 240 students have been placed in the complex through the University's housing lottery system. *Id.* at 77. In addition, an undetermined number of other University students are Columbia Plaza residents. The Board credits the testimony of Dorothy Miller, a resident and a party to this proceeding, that the quality of life in the complex has diminished as the student population has grown. Exhibit 319 at 3.

II. Conclusions of Law and Opinion

The hearings on remand provided the Board with additional information about current student housing, University plans for future on-campus housing, admission practices, and other developments since the Board's previous consideration of this application. That information, together with the parties' recommendations, has permitted the Board to revise its Order to ensure that the campus plan fully complies with the language and intent of the Zoning Regulations and is not inconsistent with the Comprehensive Plan.

The Board's initial decision in this case expressed concern that, unless conditions were imposed, the University's use

of residentially-zoned property within the campus for non-residential uses, and its resulting failure to provide sufficient on-campus housing for undergraduate students, would cause the University's use of its property to become objectionable to neighboring property. The Board shared the concerns expressed by the Office of Planning ("OP") and ANC 2A about the continued vitality of the Foggy Bottom and West End neighborhoods, as pressures associated with University expansion threaten their livability and stable residential character.

The Board's fears have proved to be justified. The recent explosive increase in student enrollment has placed additional pressures on Foggy Bottom/West End. At the beginning of the 2001-2002 academic year, almost half of the 8044 undergraduates were forced to find housing outside the campus. Stated another way, at the start of the current academic year, the University was able to provide housing for a bare majority (4108 or 51.1%) of its undergraduate students on campus.

The University has traditionally chosen to export its student overflow to Foggy Bottom/West End. It did so again for the 2001-2002 academic year. It leased two buildings in Foggy Bottom/West End, one of which housed elderly long-term residents, and created dormitories for 709 additional undergraduates. In addition, it used its status as a limited partner in the Columbia Plaza complex to obtain housing for 240 of its students. These concentrations of students have vexed elderly long-term residents in those buildings. More important, the Board agrees with OP that the University's aggressive expansion into Foggy Bottom and the West End area has brought those neighborhoods to the "tipping point," if not beyond. Large swathes of Foggy Bottom/West End have effectively been

transformed into an expanded campus at the expense of the prior variety of uses. The Board therefore concludes that the University's use of its residentially-zoned property within the campus boundaries for non-residential uses has become objectionable to the surrounding neighborhoods.

For these reasons (and for the reasons given in the Board's March 29, 2001, Order), the Board is willing to approve the proposed campus plan only if the University promptly takes decisive steps to provide housing for the bulk of its undergraduate students on campus. The Board agrees with ANC 2A that until there is a significant decrease in the number of students forced to live in the surrounding off-campus neighborhoods by virtue of insufficient on-campus housing, the campus plan is unacceptable. *See* Tr. September 13, 2000 at 315. The Board recognizes that the University needs time to construct dormitories on campus. This Order therefore provides the University considerable flexibility for the first five years of the plan. The Board encourages the University to take immediate steps to meet the conditions set by this Order.

The University will be required to make more intensive residential use of its campus property in two phases. In the first phase, starting in August 2002, the next academic year, the University will be required to make housing available for at least 5600 full-time undergraduate students on campus or in areas outside Foggy Bottom/West End. (That "base number" represents 70% of the undergraduate enrollment of approximately 8000 in the fall of 2001. *See* above, findings 1-2). This is not an onerous requirement. The University's experience in the current academic year, when it was able to acquire 709 beds in a matter of a few months when faced with an uncharacteristically

large freshman class – using short- and long-term leases – establishes that there should be no major impediment to the University's acquisition of housing accommodations in the universe outside Foggy Bottom/West End by next fall. For purposes of this Order, the Board adopts the following definition of the Foggy Bottom/West End Area: the area bounded by E Street on the south, Rock Creek Park on the west, N Street on the north, and 19th Street on the east, excluding the campus area as defined below.

A straight percentage requirement would not prevent further inundation of the Foggy Bottom/West End neighborhood by University dormitories and by students compelled to find housing outside the campus. As enrollment increases – the University has estimated that it may grow by at least another 500 students by 2005 – the neighborhoods would likely be saturated by yet more student housing under a pure percentage goal. For that reason, the University will be required to provide one additional on-campus bed for each additional student whenever the University's full-time undergraduate enrollment exceeds 8000. The University will be free to increase its enrollment but, by providing one bed for each additional student, the total number of undergraduate students accommodated in Foggy Bottom/West End should not grow. This is in keeping with the "soft cap" originally proposed by the University. *See e.g.*, Tr. September 13, 2000, at 256.

Beginning in the fall of 2006, five years from now, approval of the campus plan is conditioned on the University providing housing for the bulk of its students on campus. The University must provide accommodations in on-campus dormitories for 70% of the first 8000 undergraduates (5600 beds) and an additional bed for each full-time undergraduate over 8000. As a result of this campus plan

proceeding, the University has accelerated its campus housing program. It has applied for special exceptions to construct buildings on Squares 43 and 57 to add 900 new beds. The University expects to complete both buildings in time for academic year 2004-2005. In addition, the University has applied to the Zoning Commission to modify a PUD for University-owned property on Square 122 with a capacity of 200 more beds. If the Commission approves the PUD modification, the University may count those beds toward satisfying the housing requirements of this Order.

Even these 1100 new beds will be insufficient to satisfy the need. When completed, the University will be providing no more than 5208 on-campus beds for its current enrollment of 8044 undergraduate students (64.7%). Considering that the University projects its enrollment to increase over the life of the campus plan, an increase of 1100 beds becomes even more inadequate.

The University has identified at least three residentially-zoned squares on its campus suitable for additional dormitories. The University owns all of Square 54, the site of the current hospital. That large square will no longer be used as a hospital and will essentially be vacant in 2002. By itself, it is large enough to satisfy all of the University's housing requirements for the foreseeable future. The University also owns property in Square 103, where it estimated that housing for at least 200 students could currently be built. That square could be used more intensively for residential development if the University acquires the remaining lots, as it intends to do. Finally, the University owns a portion of Square 80, where it acknowledged that housing for 288 students could currently be built; if the District of Columbia transfers public property in the square, it could accommodate at least 650 beds.

Order, March 2, 2001, at 4. Finally, the ANC identified portions of Squares 56, 79, 101, and 103 as suitable for dormitories. Tr. September 29, 2001, at 80. This recitation of campus sites that are available to the University demonstrates that it enjoys considerable latitude in deciding how to satisfy the on-campus housing requirement.

The University has acknowledged that financing new dormitories should not pose a problem and that five years would be sufficient time to construct new dormitories. Tr. September 17, 2001, at 21-22.

The housing requirements imposed as a condition for approval of the campus plan application are neither too severe nor too lax. The Order permits the University to avoid providing housing for up to 2400 undergraduates (30% of 8000). These may be housed in University dormitories or in private properties off campus, including in Foggy Bottom/West End. The University estimated that 15% of its student body normally would consist of students for whom dormitory life is unnecessary or unsuitable: commuters; married students; students with children; religious objectors; and students with disabilities. The University estimated that only 1239 of the 8044 undergraduates then registered in September 2001 (15.4%) fell into those categories. The Board Order therefore does not prevent the slightly more than 1100 other students to continue to be housed in University or private housing within the Foggy Bottom/West End neighborhoods. While that is significantly more than the parties in opposition want, the Board believes that a student population of that size – but no greater – is not incompatible with the Zoning Regulations or the Comprehensive Plan.

Because the housing condition is the essential element of the Board's approval of the application, the Order provides that if a court enjoins any aspect of the condition containing the housing requirement, or if the University fails to comply with the condition, no special exceptions or permits for non-residential uses will be granted; those already granted pursuant to the campus plan approved by this Order will be subject to suspension. The Order also requires the University to file and serve semiannual reports to facilitate the monitoring of compliance.

The University proposed a complex housing commitment. Essentially, the University proposed that it be allowed to count its off-campus housing (other than Pennsylvania House) toward meeting a goal of housing 70% (and effective 2004, 75%) of full-time undergraduates in University-controlled dormitories. The proposal was hedged with a number of restrictions. It excluded 15% of the student body, thereby lowering the base used for calculating the number of beds needed. It introduced a number of contingencies, such as voiding the housing requirement if graduate school enrollment falls. It also proposed to count beds in buildings that the University might construct outside the campus on Squares 58 and 81.

Aside from adding needless complexity, the proposal is inadequate because it essentially permits the University to continue to house an unacceptably large number of students in Foggy Bottom/West End. As the OP correctly noted, the University simply redefines terms to permit it to claim that it is housing a high percentage of its students while "actually not changing the situation on the ground, the protection of the Foggy Bottom neighborhood. . . . " Tr. September 21, 2001, at 21. The University conceded that its students want to live nearest the school. Yet, perversely, the

University's proposal maintains the present status under which the campus is the one nearby place where a large portion of undergraduates cannot live.

The Board finds no justification for expanding the campus to include Squares 58 and 81. As noted, the University already has ample property within the campus plan boundaries specified by this Order to meet the Board's housing requirement condition. The University also recommended that the penalty for noncompliance with the housing requirement be a $100,000 "fine" payable to a public benefit program; the fine would be payable only if the University failed to cure the violation within one year. The Board believes that a fine of that magnitude (if within the Board's powers to impose at all) would constitute a nominal cost of doing business for an institution that at the end of fiscal year 2000 had total financial resources in excess of $781 million and has recently raised 394 million during a capital campaign. Exhibit 296, attachment D at 2. A year's delay in complying with the housing condition is unnecessary. The Board has phased in the requirement to accommodate students, and the record demonstrates that the University has sufficient control over its admissions process and size to match enrollment to housing availability.

ANC 2A offered two recommendations. One would force the University permanently to reduce its enrollment to 7380 students within two years and to accommodate all students on the campus immediately (except for waivers when specifically requested by individual students in certain categories). The Board concludes that a substantially reduced cap on enrollment is too onerous and inflexible and that the remainder of the proposal, for 100% on-campus housing, is probably infeasible during the life

of the current plan. By contrast, the Board's solution, with its one- and five-year phases, is both feasible and reasonable. It freezes the number of students who need not be accommodated on campus to a reasonable number, including the estimated 15% for whom dormitory life would be inappropriate and unnecessary. It requires all the rest to be accommodated outside Foggy Bottom/West End beginning in August 2002 and on campus by August 2006. The second ANC proposal omits a cap on enrollment but would have the University prohibit any University undergraduate from living in Foggy Bottom. The proposal is misconceived. It places the ultimate burden on individual students, allowing the University to avoid using its campus to provide housing altogether. The focus of this campus plan proceeding, however, is on ensuring that the campus is used in a manner that does not adversely impact surrounding residential areas. It is the property owner's obligation to prevent such an impact, not that of innocent third parties. Moreover, requiring the Zoning Administrator to monitor and enforce a ban on where individuals reside would be extremely difficult at best, if not unlawful.

OP recommended that the University be required to accommodate 70% of its fall 2001 undergraduates on campus or in a "housing opportunity area." The housing opportunity area could include anywhere outside Foggy Bottom/West End, together with Square 122 and existing dormitories at the Aston apartment house and the "Hall on Virginia Avenue." Any enrollment increase beyond the fall 2001 base would also have to be accommodated on campus or in the housing opportunity area on a one-for-one basis. The Board has adopted these recommendations in part. The Board does not believe, however, that they go

far enough to protect the surrounding communities. Indeed, OP candidly acknowledged that its proposal could theoretically permit the University to "have zero percent of their students on campus and still be in compliance." Tr. September 21, 2001, at 218. The Board therefore prefers that the University make more intensive use of its residentially-zoned campus. The Board is also conscious that its Orders should not be instruments for exporting University housing into other neighborhoods in order to protect Foggy Bottom/West End. The Board realizes, of course, that a reasonable interim period of five years is necessary to permit the University to construct more dormitories on campus. Nevertheless, there is no justification for not having sufficient on-campus housing at the end of that time to satisfy OP's numerical goals. As for existing off-campus dormitories, the University will be able to use them for student housing or for any other use permitted by the Zoning Regulations. After August 2002, however, beds in those facilities will no longer count toward the housing requirements in this Order.

Finally, the Foggy Bottom Association ("FBA") proposed that undergraduate enrollment be capped at 7881 until 75% of undergraduate students are housed on campus or in any property the University might acquire outside the ANC-2A area. The University would have until 2004 to achieve the 75% goal. Thereafter, the University would be permitted to increase enrollment so long as it had an on-campus bed for each additional student above 7881. The University would also be required to remove its students from 2424 Pennsylvania Avenue and Columbia Plaza by 2004. The Board has concluded that a "hard" cap on the number of students is unnecessary, given the other steps the Board is mandating, even though the March 29th

Order contained such a cap. It is unnecessary because the goal of preventing further adverse impact on neighboring property can be achieved by simply requiring the University to provide sufficient on-campus housing for its students. As the University grows, so do [sic] the number of accommodations that need to be constructed. Because the link between enrollment size and the adverse impact that the University's use of its campus property has on neighboring property is severed by the reasonable provisions of this Order, a hard cap on university growth is no longer essential. Its elimination is responsive to the University's plea that it be allowed to maintain flexibility in its enrollment in response to market conditions. The FBA proposal is also inadequate to bring sufficient student housing to the campus. With respect to 2424 Pennsylvania Avenue and Columbia Plaza, the Board prefers to give the University limited flexibility in meeting the housing requirement. As part of the University's proposal, it offered to remove its students from both properties. The Board believes, however, that its revised Order should serve as a strong incentive to do so.

The Board concludes that the issues and concerns of OP and ANC 2A are adequately addressed by this Order on Remand which requires future University growth to occur in conjunction with future increases in on-campus housing, thereby minimizing the University's incentive to acquire property outside the campus boundary to house its undergraduate students and decreasing the threat to permanent housing stock and other property uses in the Foggy Bottom/West End area.

III. Board Response to the Parties' Exceptions.

After reviewing exceptions filed by the parties, the Board made adjustments to its findings and conditions of approval of the campus plan and rejected other changes for the reasons that follow.[1]

A. ANC 2A (exhibit 333).

1. The ANC objected to the Board's conditional inclusion of part of Square 122 in the campus, subject to the Zoning Commission's approval of a PUD modification. The modification would permit University use of the property, including use as a dormitory. The ANC is a party to the Commission's proceedings. Here, the ANC complains that it received no prior notice that the PUD property might be included in the campus; the University had not applied for its inclusion; the Board did not hear evidence concerning the probable traffic consequences of the PUD modification; and the modification is inconsistent with the Comprehensive Plan.

The Board's contingent inclusion of the PUD property cannot legitimately be construed as endorsing approval or disapproval of the pending PUD modification. Rather, it is simply a necessary acceptance of a *fait accompli* if the Zoning Commission gives *its* approval. The Zoning Commission has sole say over the PUD process. The Board has no control over the use of the property, traffic generation, or other consequences of Commission action. In that sense,

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[1] Parties other than those specifically identified in the text also submitted exceptions to the proposed order. Their exceptions are addressed in the following discussion.

the ANC's protests are misdirected. Traffic, consistency with the Comprehensive Plan, and the like are matters that the ANC must direct to the Commission. If the Commission approves the University's proposed modification, however, thereby expanding the University beyond its current campus, no purpose would be served in the Board's refusal to recognize that expansion. If anything, inclusion of a modified PUD would help ensure that the property will be used to provide housing for a specified minimum number of undergraduate students over the life of the campus plan. Since the boundary change is essentially technical should the PUD modification be approved, the Board believes no prior notice to the ANC was necessary.

2. The ANC also objected to the Board's selection of 8000 as the base number for calculating the housing requirement in Condition 9. The ANC points out that the undergraduate population was only 6857 at the time the University filed its application in 1999 and 7380 when the Board voted to approve the campus plan (with conditions) on February 13, 2001. According to the ANC, use of current enrollment as the base number "rewards" the University's "uncontrolled growth."

Although the ANC's criticism has some merit, the Board concludes that its selection of 8000 is justified. In the March 29, 2000, Order formally adopting the February 13 vote, the Board concluded that University use of its residentially-zoned campus for nonresidential purposes would imminently become objectionable. At the time, undergraduate enrollment stood at 7380, well above 1999's enrollment of 6857. The University's growth since February 13, forcing even more undergraduate students into Foggy Bottom/West End, has convinced the Board that the

University's use of its campus has now become objectionable. It follows that some number greater than 7380 yields the "tipping point," the point at which the survival of the surrounding neighborhoods has become seriously threatened. That point cannot be determined with great precision. Using 8000 as the base number means that the University need not provide housing for 2400 undergraduates (30% of 8000); using 7380 translates into 2214 undergraduates without university housing (30% of 7380). Stated another way, using 8000 as the base number requires the University to supply 5600 on-campus accommodations; using 7380 would require 5786 beds ((7380 x 0.7 + (8000-7380)). Under either analysis, the difference is only 186, a relatively small number. While the Board might have chosen a different base number, the number it chose was reasonable, especially if it makes satisfying Condition 9 during the life of this campus plan more feasible. The Board therefore declines to change the base number.

3. There is no need to reaffirm Condition 17, which requires the University to provide annual audited counts of the number of full-time undergraduates living in Foggy Bottom/West End to the Advisory Committee established in accordance with Condition 3. The March 29 Order remains in effect unless changed by this Order, expressly or by necessary implication.

Nevertheless, the ANC request, coupled with the Foggy Bottom Association's related request for additions to the reporting requirements in Condition 9, persuades the Board to modify its Order in two respects. First, the Board agrees that members of the Advisory Committee should be included among those to receive the semiannual reports required by Condition 9, just as they are included in

Condition 17. Second, the Board agrees that the reports required by Condition 17 should be filed semiannually (rather than annually), contemporaneously with the related reports required by Condition 9; should be served on the ANC, Zoning Administrator, Zoning Commission, Office of Planning, and Advisory Committee; and should include more information than the Board initially requested.

B. The University (exhibit 334).

1. The University challenged the Board's conclusion that use of its campus for nonresidential purposes adversely affects the neighboring area.

The University's assertion that its off-campus housing facilities had previously been used as hotels or other transient or commercial uses is exaggerated. The University bought the Dakota apartment house in the 2100 block of F Street. Even if the Dakota housed a number of students when the University acquired it, its acquisition for student housing permanently removed it from housing stock available to non-students. Similarly, the Aston was classified as an apartment house when the University acquired it. Exhibit 165 at 3 (R. 1523).[2] The University also bought an interest in Columbia Plaza, a complex that had previously been used primarily for permanent residents and has a right of first refusal to buy a larger share of the property. Exhibit 92 at 3 (R. 503). Columbia Plaza's

[2] References marked "R. ___" refer to the pagination of the record on appeal to the District of Columbia Court of Appeals in *George Washington University v. Board of Zoning Adjustment*, No. 01-AA-571.

general partner notifies the University of vacancies "up to our investment percentage" and the University "recommends" students for the vacancies. Tr. September 17, 2001, at 72-73, 77. It is likely that those "recommendations" translate into preferences for students. *Compare id.* at 77 (University does not know whether students are given preference) *with* tr. September 26, 2000, at 173 (R. 2610) (testimony by tenants' association that preference is given). The University leased Pennsylvania House twice. The Board received evidence, which it credits, that the University's initial lease caused a remodeling of apartments into furnished suites for students. The remodeled suites were not restored to long-term housing stock when the University's leases lapsed. Exhibit 185 at 3 (R. 1554). The most conspicuous example of the loss of permanent housing stock is Square 43, which the Board in 1998 explicitly refused to include within the campus in order to preserve long-term residential housing. Application of George Washington University, No. 14455, Order, Feb. 25, 1988, at 34 ("The board believes the removal of Square 43 to be essential to the preservation and enhancement of residential uses in the Foggy Bottom neighborhood"); *id.* at 41. The University acquired over two-thirds of the square and leveled 33 townhouses. Exhibit 25 at 3-4. (R. 308-309). The new use for the property is solely student housing, excluding other potential residents.

These examples demonstrate the erosion of the long-term residential housing in Foggy Bottom/West End. As the Foggy Bottom Association correctly observed, "[o]nce properties are part of the university's inventory, they are irretrievably lost to the residential community." Exhibit 191 at 7; (R. 1684).

The University's assertion that it had not displaced longtime residents is also beside the point. The Comprehensive Plan calls for retaining existing businesses and employment opportunities. 10 D.C.M.R. § 1301.1. The Plan regards hotels as "key element[s] of . . . economic development" and as "important activity generators," especially in Ward 2. 10 D.C.M.R. § 1331.1; *see* 10 D.C.M.R. § 1332.1 (creating an objective to increase hotel space in the ward). While increasing the concentration of transient facilities in Foggy Bottom/West End is undesirable, 10 D.C.M.R. § 1331.4, so is the loss of existing commercial activity, associated employment opportunities, and neighborhood amenities, such as hotel restaurants and public spaces. Even the loss of uses that are not purely residential, therefore, is a matter of proper concern. Moreover, as a witness cogently observed, a loss of short-term residential facilities exerts economic pressure to convert long-term residential properties to transient use. Tr. September 17, 2001, at 108-109.

Elimination of long-term residential housing and commercial properties through University off-campus acquisitions is not the only objectionable consequence of the University's failure to provide on-campus housing. It has forced large numbers of students to compete for housing in Foggy Bottom/West End. The Board received credible evidence that, in early 2000, students comprised more than 50% of the occupants of six large apartment houses and smaller but considerable percentages in several others. *See, e.g.*, Exhibit 93 (R. 510-511); exhibit 272, attachment B (R. 3322); exhibit 200, attachment III (R. 2141). As OP noted, the University was unable to confirm or refute this testimony because it kept no statistics as to where students

live. Exhibit 190 at 7 (R. 1643); Tr. September 26, 2000, at 217 (R. 2517).

The Board heard credible evidence that these concentrations of students had effectively turned apartment houses into dormitories and townhouses into fraternity houses. Tr. September 26, 2000, at 64 (R. 2436). Such large transient populations in addition to those housed in the University's off-campus dormitories, undermine the residential stability of the already fragile Foggy Bottom/West End neighborhoods. The Board also received evidence of student misconduct in private housing. The supplemental findings cite two examples, in Columbia Plaza and Pennsylvania House. There are others. A letter from a resident complained that "[l]ast week there was beer can bowling in the hallway of my [Columbia Plaza] apartment building." Exhibit 179 at 1 (R. 1539). The Board heard testimony from a neighbor of undergraduates at another location: "They're wild. They drink. They make a mess, and we have to call the police. . . . " Tr. September 26, 2000, at 170 (R. 2607). Another witness spoke of having to summon the police on a weekly basis because of rowdy parties in a two-bedroom house occupied by six to ten students. Tr. September 26, 2000, at 186 (R. 2623); *see* Exhibit 236 & attachments (R. 2840, 2842-2844).

In short, there was substantial evidence before the Board to refute the University's contention that its failure to provide sufficient on-campus housing has not had objectionable consequences for the surrounding areas. As OP observed, the core issue is the "cumulative impact" of the University's actions. Tr. September 26, 2000 at 393-394 (R. 2765-2766). The communities' diversity has been so severely compromised that, at this point, the cumulative

impact of increasing concentrations of students has become objectionable.

The University's protest, that the greatest damage to Foggy Bottom/West End was caused by freeway construction and other activities, is irrelevant to this campus plan proceeding even if true. Here, the only relevant issues are whether the plan should be approved and, if so, with what restrictions, if any. The evidence before the board established that the University's failure to use its residential property for residential purposes was aggravating conditions in an already fragile neighborhood, whatever the initial cause for the area's decline. The Board heard credible testimony that university expansion is *now* the "driving force" in the neighborhoods' decline. Tr. September 26, 2000, at 323 (R. 2695). Conditions may only become worse without the Board's intervention. University expansion, without a corresponding provision of student housing, OP informed the Board, "will lead to the inevitable elimination of the Foggy Bottom Area as a recognizable residential neighborhood." Exhibit 190 at 19 (R. 1655); *see* Tr. September 26, 2001, at 218 (Tr. 2518) (expansion is objectionable because "there is so little left of the neighborhood housing stock and the neighborhood fabric"); *id.* at 232 (R. 2532) (Foggy Bottom/West End's problems are already "too acute"). There is therefore no need for the Board to explore the reasons for the onset of the neighborhoods' deterioration.

Finally, the Board rejects the University's argument that its burgeoning undergraduate population is irrelevant because the University's total student population has allegedly not increased, a proposition disputed by other parties. *See* Exhibit 191 attachment at 5 (R. 1682); *see also*

id. attachment A (R. 1696) (showing growth of full-time undergraduate *and* undergraduate enrollment between 1985 and 1999). Even if the University's overall population has not varied, the growth in undergraduate enrollment is alone ample foundation for Condition 9. The University's own actions demonstrate why. With the surge of undergraduates over the past several years, the University acquired more dormitories in Foggy Bottom/West End. During the past academic year alone, it added more than 700 beds to its off-campus inventory to keep pace. Absent a showing by the University that the student population of Foggy Bottom/West End remained static, the Board must infer that the additional dormitories represent a net increase in the total Foggy Bottom/West End student population. The University told the board that approximately 70% of its graduate students live outside the District of Columbia and that relatively few of the rest live in Foggy Bottom/West End. Exhibit 165 at 2 (R. 1522). That strongly implies that, as graduate enrollment falls and undergraduate enrollment rises, the number of students searching for housing in the two neighborhoods increases even without an overall increase in enrollment. The University previously acknowledged, however, that its student population will *not* remain static over the life of the campus plan. It expects a 20% increase in full-time equivalent student enrollment. Exhibit 21, appendix C (R. 124). Since undergraduate students have recently formed the larger share of that increase (Tr. September 13, 2000, at 168; R. 1934), ever larger masses would be forced to hunt for nearby housing.

2. The University's exceptions attempt to introduce new evidence well after the record closed, alleging that information it had previously provided to the Board in these

lengthy hearings about the number of undergraduate students who commute understated the actual number by 50% to 100% or more.

The Board cannot accept the University's new evidence. It is inexcusably late. While the University contended that the information was never sought during the hearings, it bore the burden of proof on all matters in this proceeding under the District of Columbia Administrative Procedure Act: "In contested cases, except as may be otherwise provided by law, . . . the proponent of a rule or order shall have the burden of proof." D.C. Code § 2-509(b) (2001 ed.) The Board's Order on Fact Finding (September 13, 2001, at 2), offered the University "an opportunity to elaborate on or supplement the information provided in its responses to the Board's inquiries. . . . " The University declined the invitation by failing to "elaborate on or supplement" during the remand hearings. Even now, the University has not presented the Board with a proper motion to reopen the record to provide additional information.

The University cannot reasonably claim to have been unaware that a central element in the Board's inquiry in this campus plan proceeding was the number of students living in Foggy Bottom/West End. *See* 11 D.C.M.R. § 210.2. In fact, other parties explicitly complained repeatedly about the University's failure to provide data about its students' whereabouts. *See, e.g.,* Tr. September 26, 2000, at 223, 280-281 (R. 2523, 2652-2653).

To consider the University's new numbers at this late date would be unfairly prejudicial. Other parties have not had the opportunity to cross-examine or to submit rebuttal evidence. The figures may be based on double counting

commuters who are also married, or have children, religious views, or disabilities. They may be aberrational. They may or may not be the direct consequence of the failure of the University to supply sufficient housing on campus for undergraduate students. No underlying data are before the Board to allow the new numbers' reliability to be evaluated. The University's previous submissions displayed substantial variability. During the hearings, for example, the University informed the Board that 1672 undergraduates lived in Foggy Bottom, 543 elsewhere in the District, and 1261 in Virginia and Maryland. Exhibit 230 at 2 (R. 2830). During the remand proceedings, the University informed the Board (as well as a United States district court) that only 829 students lived in Maryland and Virginia – a 50% discrepancy. Finding 2, above at 2. As Finding 2 reflects, the University assured the Board the latter number was reliable and verifiable. The problem is that these are all questions about which the Board would be forced to speculate. The current record provides the Board no basis to resolve them. The Board therefore rejects all exceptions based on information that was never introduced in the record.

Even if, however, the number of commuters is greater than the record evidence shows, the Board has noted that its conditional approval of the campus plan allows the University to avoid providing housing for 30% of its undergraduate students – the equivalent of, say, more than the entire senior class – and all of its graduate students. The Board's initial intention was to require the University to provide sufficient housing to accommodate the equivalent of all of its undergraduate students but to allow for a "carve-out" for students for whom dormitory

living was inappropriate or unnecessary. During the many hearings on the campus plan, the University estimated that 15% of undergraduate students fit that description. This Order allows the University to decline to provide housing for *twice* that number. Thus, the Board's 30% allowance provides a reasonable cushion even if the information the University provided to the Board during the course of these proceedings was incomplete or inaccurate.

The Board's references to undergraduate students should not be misinterpreted. The Order does not dictate which students are to occupy University housing; it is designed only to relieve pressure on the surrounding communities created by the University's failure to provide sufficient on-campus housing. The number of undergraduate students was chosen as a benchmark for several reasons. Undergraduates are the fastest growing segment of the University's population. They constitute the only category of students for whom the University has acquired housing outside the campus and for whom it has traditionally provided housing. They are also the group that the University characterizes as having more "behavioral problems" and of being less mature. Exhibit 165 at 2 (R. 1522) (graduate students "are generally older and more mature" and "present fewer behavioral problems compared to undergraduates"). By obliging the University to provide 5600 beds on campus, and an additional bed whenever undergraduate enrollment exceeds 8000, the Board expects the number of students forced to find housing off-campus to decline and pressure on Foggy Bottom/West End to ease significantly, even absent restrictions on which students can occupy the on-campus beds. Nothing in the Board's Order, it bears repeating, can legitimately be

construed to tell students where they can or must live. Rather, the Order simply requires the University to add residential space on its residentially-zoned campus so that undergraduates are not forced into the surrounding communities.

3. The University repeatedly notes that the Zoning Regulations permit universities to establish dormitories in certain residential districts as a matter of right. The Board agrees with that proposition and so held in *Appeal of Sheridan*, No. 16507, Feb. 11, 2000. But that is not the end of the analysis. The Zoning Regulations also provide that University property must be used so as not to become objectionable to neighboring property and must be used consistently with the Comprehensive Plan. While the Board cannot prohibit the University's creation of off-campus dormitories, it must assess the impact of a university's decision to use residentially-zoned campus property for nonresidential purposes. The record in these proceedings reveals that this University's failure to provide on-campus housing has directly harmed the surrounding communities and that the University's own off-campus expansion is a symptom of that harm. Under those circumstances, it is plainly within the Board's power to regulate the use of *campus* property, irrespective of off-campus rights conferred by the Zoning Regulations, whenever *campus* uses have adverse external effects and are inconsistent with the Comprehensive Plan.

4. Contrary to the University's objections, the Board's refusal to expand the campus border to squares 58 and 81 is essential to protect the southern border of the campus against further encroachment. OP testified that the southern flank is at great risk. Tr. September 26, 2000, at 216 (R. 2516). The two squares contain a variety of current

uses that the Comprehensive Plan suggests are worthwhile preserving, including a hotel, drug store, rooming house, offices, and residences, among others. To designate the squares as parts of the campus is to create hydraulic pressure on existing uses, as the University's previous on-campus expansion has demonstrated through the years. Considering the availability of ample space for the construction of dormitories on the campus as currently designated, the Board sees no justification for further enlargement.

5. The University objected that compelling it to use residentially-zoned property for student housing gives an unwarranted preference to housing over other academic needs. Although the Board is sympathetic to the University's other needs, the Board's obligation is to ensure compliance with the Zoning Regulations and the Comprehensive Plan. Without Board intervention, there may be no remaining space on campus for student housing. The University took inconsistent positions on that likelihood. On the one hand, it told the Board that "we have a mature, older campus and it's getting to be a zero sum [game], that if you do academic, you can't do housing." Tr. September 13, 2000, at 176 (R. 1942). On the other hand, it told the Board that its "campus is not densely developed when compared to the surrounding commercial area." Exhibit 22 at 27 (R. 105); *id.* at 23 (R. 100) (even with planned growth, gross floor area will be "well below" the regulatory limit). In any event, the Order places no limit as to where the University can locate its academic buildings. OP and other witnesses cited Georgetown University's decision to move its law school outside its campus as an example of an option for George Washington University to consider. Tr. September 26, 2000, at 44, 259 (R. 2416,

2559). The University may also consider converting some commercially-zoned properties into classrooms or administrative offices.

6. The Board imposed the requirement that the University accommodate a minimum number of students on campus by late 2006 for three reasons: first, to absorb most of the excessive number of University students who live in Foggy Bottom/West End because of the absence of on-campus housing; second, to prevent the Board Order from being the unintentional instrument for placing strains on other neighborhoods; third, to ensure that the residentially-zoned campus is put to more intensive residential use. The first two reasons have been adequately addressed. The third deserves elaboration.

One of the Council's concerns in the Comprehensive Plan is to foster greater residential use downtown and in the ring of neighborhoods surrounding downtown. 10 D.C.M.R. § 1325.1. The Council expressed concern about the loss of housing stock in Foggy Bottom/West End, "aggravated by the lack of dormitory construction on the George Washington University (GWU) campus." 10 D.C.M.R. § 1325.3. Among the Plan's prime objectives are the conservation and enhancement of existing residential neighborhoods and the creation of new ones. 10 D.C.M.R. § 1326. If the campus is entirely devoted to nonresidential uses, it will be irrevocably lost to residential use despite its residential zoning. Institutional nonresidential space creates dead zones, robbing the area of vitality and diversity, especially after classes end in the evenings and during weekends, holidays, and school vacations. More intensive residential use should add "street vitality and safety." Tr. September 26, 2000, at 323 (R. 2695). It is therefore consistent with the Comprehensive Plan to direct the University not only

to allevaite the pressures on Foggy Bottom/West End (10 D.C.M.R. § 1327.1(b)), but also to insist on a residential core on campus. See 10 D.C.M.R. § 1342.1 (University campus plans are to "take account of the residential . . . status of Foggy Bottom in any future development"). This is not a new concern. In the 1985 campus plan, the Board directed the University to retain on-campus apartment houses that it was in the process of acquiring for housing and to build at least one new on-campus dormitory. *Application of George Washington University*, No. 14455, February 25, 1988, at 37-38.

7. Although the University charged that the "record establishes that there is no way the University can meet this [on-campus] housing in the fall of 2006," it failed to cite any part of the record for support. If anything, the record contains testimony that can reasonably be interpreted to the contrary. The Board was informed that the University needed five years, measured from September 13, 2000, the date of the testimony, to construct dormitories satisfying its promise to add more beds: "We're going to add more beds than students in five years. But we need the five years. It takes time to build beds. . . . " Tr. September 13, 2000, at 153 (R. 1919); *see,* similarly, tr. September 17, 2001 at 21-22 ("We thought the five-year time frame made sense because we need time to build new residential facilities"). The Board has given the University an additional year, until August 2006, to supply more on-campus housing. In September 2000, the University also testified that it would shortly begin the process to allow construction of a 500-bed dormitory on campus, on Square 54 or elsewhere. It told the Board that it was so committed to moving "aggressively" to obtain approval for development of Square 54 that it "pledge[d]" to file at least a

first-stage PUD application with the Zoning Commission "within 15 months." Tr. September 26, 2000, at 355 (R. 2727). That fifteen-month period ended December 13, 2001. The University also told the Board that it would be possible within five years to build a 500-bed dormitory on Square 54 or elsewhere on campus prior to commercial development of Square 54. Exhibit 196 at 3 (R. 1865); Tr. September 13, 2000, at 213 (R. 1979).

Based on the University's own testimony and other evidence in the record, the Board reasonably concluded that the University would be able to satisfy the Condition 9 requirements by August 2006. The University had 4108 on-campus beds as of September 2001. Finding 8, above at 3. Another 1093 will be built by fall 2004 (if Square 122 is included), raising the total of 5201. *See* above at 6. The University also has the ability to provide another 988 beds on campus: 500 on Square 54 or an alternate site; 200 on Square 103; and 288 on Square 80. *See* above at 6; exhibit 196 at 3 (R. 1865). That adds up to 6189 beds together, more than enough to satisfy Condition 9 absent large increases in enrollment.

There is, however, merit to the University's objection that Condition 9 does not provide relief if construction of on-campus dormitories is delayed for reasons outside the University's control. The Board understands that unusual circumstances may force construction delays despite the University's prompt, expeditious, and good-faith efforts.

The Board has therefore amended Condition 9 to allow for application to the Zoning Commission for additional time to meet on-campus housing goals under limited circumstances, after notice and hearing. The additional time is to be equivalent to time lost as a result of unusual delays by

government agencies in processing applications for special exceptions or other construction permits; the resolution of third-party appeals to the District of Columbia Court of Appeals or to another judicial forum; or construction delay resulting from acts of God, contractor delays, or acts of third parties. Additional time is not authorized if the delay is fairly attributable to the University. In particular, the amendment does not authorize extensions of the Condition 9 deadlines for time lost as a result of delays in the processing of PUD applications. The University can build housing on campus through special exceptions, and the Board is unwilling to allow controversial nonresidential projects to hold campus housing hostage. The University remains free, of course, to apply for mixed-use PUDs but the University's choice to do so cannot serve to extend the time for providing urgently needed housing beyond the 2006 deadline.

It is worth noting that the principal sanction for failure to build sufficient housing by 2006 is the denial of permission to construct and occupy new nonresidential buildings. That penalty bites only when the University has given nonresidential projects priority over residential ones. In other circumstances, factors preventing the University from completing housing on time should normally delay other projects equally.

8. The Board declines the University's invitation to alter the requirement in Condition 9.a to provide more housing on campus or outside Foggy Bottom/West End between August 2002 and August 2006. The University asserted that it spent "millions of dollars" to acquire and convert its present inventory of off-campus housing. It also claimed that there is no record evidence that it will be able to

acquire housing outside Foggy Bottom/West End for four years.

As the Board previously noted, above at 9, the Board Order does not prevent the University from continuing to use the Foggy Bottom acquisitions for dormitories. It only prevents such acquisitions from counting toward the undergraduate housing goal. If the University finds it infeasible to continue their current use, nothing in the record suggests an impediment to their return to pre-existing uses or to long-term residential use. On the contrary, the University already owns a number of structures that it uses for investment income. For example, the University owns One Washington Circle but continues to operate it as a hotel. Tr. September 17, 2001, at 103. The Board heard testimony (never rebutted) that at least one of the off-campus dormitories was acquired as investment property and was converted only to accommodate an unexpected spurt in enrollment. Tr. September 26, 2000, at 72 (R. 2444). More than 700 of the off-campus accommodations, moreover, were acquired after the Board clearly put the University on notice, in its March 29, 2000, Order (at 10-11), that the Board intended to prevent Foggy Bottom/West End from being forced to absorb additional dormitories.

Although it is true that the record does not specifically establish that the University can acquire four-year leases for off-campus housing, it does establish that the University has acquired property in a shorter time in a much smaller geographic area. Finding 14, above at 4. That evidence, combined with the University's ample financial resources, is sufficient for the Board to conclude that the University should be readily able to find the off-campus space necessary to comply with Condition 9 in the District

or elsewhere in the metropolitan area. OP testified that it would be "more than happy" to assist in locating interim space. Tr. September 20, 2000, at 231 (R. 2531).

9. The University informed the Board that its application to the Zoning Commission for a PUD modification for Square 122 has been amended to reduce the number of projected student accommodations to 193 and 200. The University's explanation is that the reduction stems from agreement with the West End Citizens Association to provide neighborhood amenities such as retail space. Because the reduction is minor and the University remains subject to the housing requirements of Condition 9, the Board has modified Condition 2 to the extent of redrawing the campus boundary to include the Square 122 PUD once beds for at least 193 undergraduates are made available there.

10. In passing, the University asserted that the Board failed to consider the University's proposal to modify Condition 15(e) relating to student automobile registrations. The University made that proposal on remand (without objection) but presented no new evidence. Tr. September 21, 2001, at 194. Absent a compelling reason to change, the Board retained Condition 15(e) and found no need to make additional findings on remand. The Board has placed a more stringent automobile registration condition in an Order approving another campus plan (*Application of Georgetown University*, No. 16566, Mar. 29, 2001), and the Zoning Commission has voted to include similar language in yet another campus plan order currently under consideration. *Application of American University*, Z.C. 00-36CP/16638.

C. The Foggy Bottom Association (exhibit 330).

1. The Foggy Bottom Association criticized the Board's use of 8000 as the base number in Condition 9, echoing the ANC. It regarded the growth of undergraduate enrollment to result from the "University's blatant disregard of the expressed intent" of the Board's February 13 oral decision and March 29 Order. The Association recommended that undergraduate enrollment be permanently capped at 7881 and the University be required to provide housing for 5911 of those students (75% of 7881).

The Board declines to revisit the formula contained in Condition 9 largely for the same reasons that the Board rejected the ANC's proposed change. The fact that two community organizations could plausibly come up with different formulations illustrates how people can reasonably disagree about precisely where the line should be drawn. In addition, however, the recommendation for a permanent cap on undergraduate enrollment remains unnecessary and undesirable. *See* above at 8, 9. The campus plan that the Board is approving achieves consistency with the Zoning Regulations and Comprehensive Plan through reasonable restrictions on land use. Within five years, the University must supply sufficient on-campus housing for at least 70% of its undergraduate students. Condition 9 will act as a "soft cap" on enrollment by requiring the University to have an additional on-campus bed available for each student it admits over the 8000 base number. Condition 9 is therefore a land-use tool that satisfies the Zoning Regulations and the Comprehensive Plan without intruding in the University's academic decisions.

2. The Association protests that the Order does not address the growth of graduate enrollment and the possibility that graduate students will fill accommodations in Foggy Bottom/West End vacated by undergraduates. However, there is little evidence in the record on which the Board could reasonably rely to evaluate the need for on-campus housing for graduate students. What evidence there is suggests that most graduate students (whose numbers appear to have been declining in recent years) do not live in Foggy Bottom/West End. *See* above at 13.

3. As noted above (at 11), the Board agrees with the need for modifications in the reporting requirements and has revised Conditions 9 and 17 accordingly.

4. The Association's apprehensions about enforcement of the Board Order appear baseless. The Board anticipates that the University will comply with this Order in good faith. If not, the remedies provided by this Order and by law should be sufficient to call the University to account. In particular, the Order's requirement that no nonresidential construction may take place when the University is out of compliance is a serious sanction. Tr. September 20, 2000, at 153 (R. 1919); Tr. September 26, 2000, at 366 (R. 2738). The Order provides the community, the Zoning Commission, which henceforth reviews special exception applications for the campus (Z.C. Order No. 932, 47 D.C.R. 9725 (2000)), and the Department of Consumer and Regulatory Affairs with the information needed to monitor compliance closely. Aside from these provisions violations of the campus plan can also be prosecuted under the Civil Infractions Act, D.C. Code § 2-1801.01 *et seq.* (2001 ed.), and the Zoning Act of 1938, D.C. Code § 6-641.09 (2001 ed.); *see* 11 D.C.M.R. §§ 3204.1-3204.5 (1995), 16 D.C.M.R. § 3229.1(c) (1993).

IV. Conditions.

Accordingly, it is **ORDERED** that the application is **GRANTED** subject to the following **CONDITIONS** contained in the Order of March 29, 2001, as amended in the following paragraphs:

Condition 2 is amended to read:

> 2. The campus boundary as depicted in the plan offered by the Applicant is modified and expanded to encompass certain University-owned properties located outside of and adjacent to the southern boundary as previously drawn. The campus plan boundary shall be redrawn to include within it the Dakota at 2100 F Street in Square 81; 2201 Virginia Avenue (Riverside Towers), addresses 518 through 526 22nd Street in Square 58; addresses 2206 and 2208 F Street in Square 58; and the University-owned property in Square 43. In addition, in the event that the Zoning Commission approves the University's application for modification of the approved PUD for Square 122, the campus boundary shall be redrawn to include the PUD property in Square 122 once at least 193 beds for undergraduates are made available there.

Condition 9 is amended to read:

> 9. The University must ameliorate the adverse consequences of its failure to supply sufficient housing for its full-time undergraduate students on campus by taking the following steps:
>
> a. Beginning no later than August 31, 2002, the University shall provide beds for at least 5600 full-time undergraduate students on campus or outside Foggy Bottom/West End

(as the terms "campus" and "Foggy Bottom/West End" are defined in this Order).

b. Beginning in August 2002, whenever the head count of full-time undergraduate enrollment exceeds 8000 (the "base number"), the University shall provide one bed on campus or outside the Foggy Bottom/West End area for each full-time undergraduate in excess of the base number.

c. No later than August 31, 2006, the housing requirements in subparagraphs a. and b. of this condition shall be met exclusively by on-campus housing. The Zoning Commission may extend this deadline after notice and public hearing but only (1) to the extent of time lost as a result of unusual delays by government agencies in processing applications for special exceptions for residential projects; (2) for the duration of third-party appeals to the District of Columbia Court of Appeals or to another judicial forum from the grant of a special exception for a purely residential project; (3) to the extent of time lost as a consequence of construction delay resulting from acts of God, contractor delays, or acts of third parties. No extension may be granted for delays fairly attributable to University actions or for delays resulting from the processing of Planned Unit Development (PUD) applications before the Zoning Commission or from judicial challenges to PUD approvals.

d. Beginning February 28, 2002, and semiannually thereafter in August and February, the University shall file with the Zoning Commission, Zoning Administrator, the

Office of Planning, ANC 2A, and members of the Advisory Committee established in accordance with Condition 3 reports under oath giving (1) the number of full-time undergraduate students then enrolled; (2) the number of University-supplied beds (a) occupied by and (b) made available to full-time undergraduate students on campus; (3) the number and location of University-supplied beds (a) occupied by and (b) made available to its full-time undergraduate students outside the Foggy Bottom/West End area; (4) the number and location of University-supplied beds (a) occupied by and (b) made available to its full-time undergraduate students within Foggy Bottom/West End. For purposes of these reports, the term "University supplied beds" shall include beds in any property in which the University has an ownership, leasehold, or contractual interest. Each report shall be accompanied by supporting documentation and full explanations of methods, assumptions, and sources used to compile information in the report.

e. No special exception shall be granted and no permit to construct or occupy buildings for nonresidential use on campus may be issued, and existing special exceptions and permits issued pursuant to the campus plan approved by this Order shall be subject to suspension and revocation, whenever a semiannual report reveals that the University is not in compliance with the provisions of this condition except special exceptions and permits for projects in which a student housing component would occupy at least 50% of the FAR. In addition, Condition 20 of

the March 29, 2001, Order, shall apply to violations of this condition.

f. The foregoing condition is an integral, non-severable aspect of the Board's approval of this application. If any portion of this condition is declared void for any reason by any court in any proceeding, no application for a special exception will be processed and no permit to construct or occupy buildings for non-residential use on campus may be issued until and unless the Board thereafter orders otherwise.

Condition 17 is amended to read:

17. Starting in the Fall 2001 registration process, the University shall ascertain the local addresses of the full-time undergraduate population. The University shall update the information semiannually. Beginning February 28, 2002, and semiannually thereafter in August and February, the University shall provide the Zoning Commission, Zoning Administrator, ANC 2A, Office of Planning, and Advisory Committee with an audited census of the number of full-time undergraduate students residing in (1) Foggy Bottom/West End outside the campus plan boundaries organized by postal zip codes; (2) the District of Columbia outside the campus plan boundaries and Foggy Bottom/West End; (3) Maryland; and (4) Virginia. Each semiannual report shall also include a good faith estimate of the number of married students and students with children encompassed in each category, (1)-(4). The latest semiannual report shall be included with each application for a special exception filed pursuant to the approved 2001 Campus Plan.

Vote on Remand to Alter Conditions 2 and 9:

5-0 (Sheila Cross Reid, Anne M. Renshaw, Carol J. Mitten, Geoffrey H. Griffis, David W. Levy, to grant subject to stated conditions).

Vote to Issue Proposed Remand Order for Exceptions:

4-0 (Geoffrey H. Griffis, Anne M. Renshaw, Carol J. Mitten, and David W. Levy, to issue the proposed order)

Vote to Issue Final Order:

4-0 (Geoffrey H. Griffis, Anne M. Renshaw, David W. Levy, and Carol J. Mitten (by absentee vote), to issue the final order as amended at the public meeting on December 11, 2001)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved issuance of this Order.

ATTESTED BY: /s/ Jerrily R. Kress
JERRILY R. KRESS, FAIA
Director

Final Date of Order: DEC 21 2001

PURSUANT TO 11 D.C.M.R. § 3125.6, THIS ORDER WILL BE COME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 D.C.M.R. § 3125.9, THIS ORDER WILL BECOME EFFECTIVE 10 DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 D.C.M.R. § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER, AND MAY RESULT IN THE IMPOSITION OF FINES AND PENAL TIES PURSUANT TO THE CIVIL INFRACTIONS ACT, D.C. CODE §§ 2-1801.01 TO 2-1803.03 (2001 ED.)

THE APPLICANT SHALL COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, CODIFIED AS CHAPTER 14 IN TITLE 2 OF THE D.C. CODE. *SEE* D.C. CODE § 2-1402.67 (2001). THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THE HUMAN RIGHTS ACT. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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BZA APPLICATION NO. 16553-E

As Director of the Office of Zoning I hereby certify and attest that on **DEC 21 2001**, a copy of the foregoing Final Order on Remand for BZA Application 16553 was mailed first class, postage prepaid, to each party and public agency who appeared and participated in the public hearing concerning this matter, and who is listed below:

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ShawPittman
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Washington, D.C. 20037-1128

Jack Evans, Councilmember
Ward Two
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Suite 106
Washington, D.D. [sic] 20004

Maria Tyler, Commissioner
Single Member District 2A03
949 25th Street, NW
Washington, D.C. 20037

Chairperson
Advisory Neighborhood
Commission 2A
c/o St. Mary's Court
724 24th Street, NW
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Jeff Marootian, Commissioner
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Sara Maddux,
Representative
Monroe House
Condominium Association
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Attested by: /s/ Jerrily R. Kress
JERRILY R. KRESS, FAIA
Director

APPENDIX E

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

441 4th Street, N.W., Suite 210-S,
Washington, DC 20001 (202) 727-6311

★ ★ ★

Application No. 16553 of the George Washington University, pursuant to 11 DCMR § 3104.2, for a special exception for the review and approval of the University Foggy Bottom Campus Plan – Years 2000-2010 under Sections 210 and 507. The boundaries are as follows: Pennsylvania Avenue on the north; 19th; H, 20th, and G Streets on the east; F Street on the south; and 23rd, G and 24th Streets on the west, and also includes a portion of Square 122 extending south of F Street along 19th Street, N.W. Within the campus plan boundaries, the property owned by the University is devoted to a variety of University uses, including but not limited to classroom, dormitory, library, research, office, support, assembly, athletic, and hospital purposes. These uses would be continued under the Campus Plan in a variety of existing and new buildings in the R-5-D, R-5-E, C-3-C, and SP-2 Districts: Square 39, Lot 803, Square 40, Lot 36, Square 41, Lot 40, Square 42, Lots 54 and 55, Square 54, Lot 30, Square 55, Lots 28, 854, and 855, Square 56, Lots 30 and 31, Square 57, Lots 55 and 56, Square 75, Lots 23, 33, 34, 41, 42, 46, 47, 858, 961, 863, and 864, Square 77, Lots 5, 59, 60, 845, 846, and 864, Square 79, Lots 63, 64, 65, 808, 853, 854, 861, and 862, Square 80, Lots 2, 26, 27, 28, 29, 42, 45, 46, 47, 50, 51, 52, 54, 55, 800, 811, 820, 821, 823, 824, 825,

and 828, Square 101, Lots 58, 60, 62, and 879, Square 102, Lot 46, Square 103, Lots 1, 13, 27, 28, 33, 35, 40, 812, 813, 814, 816, 817, 818, 819, and 820, Square 119, Lot 26, Square 121, Lot 819, Square 122, Lots 824 and 825; these Squares are within the campus plan boundaries; Square 39, Lot 77, Square 40, Lot 79, Square 41, Lot 80, Square 42, Lot 101, Square 54, Lot 102, Square 55, Lot 103, Square 56, Lot 119, Square 57, Lot 121 (part only), Square 75, Lot 122 (part only).

HEARING DATES: April 26, 2000, September 13, and September 26, 2000

DECISION DATES: December 12, 2000 and February 13, 2001

PRELIMINARY MATTERS:

Advisory Neighborhood Commission (ANC) 2A was a party in this proceeding. The Board received requests for party status from the Foggy Bottom Association, the Monroe House Condominium Association, Stephen Mandelbaum, James McLeod, Dorothy Miller, Barbara Spillinger, and Maria Tyler. These requests were all granted.

FINDINGS OF FACT:

1. The George Washington University (hereinafter "University" or "Applicant") originally filed an application December 28, 1999 for review and approval of the George Washington University Foggy Bottom Campus Plan for Years 2000-2010. A revised proposal was filed April 12, 2000.

2. The boundaries of the George Washington University Foggy Bottom Campus encompass approximately 43 acres, generally extending from Pennsylvania Avenue on the north to F Street on the south and from 19th Street on the east to 24th Street on the west. Property within the campus boundaries is zoned R-5-D, R-5-E, SP-2, and C-3-C.

3. The campus is surrounded by high-density zoning, including C-3-C to the north, C-4 to the east, R-5-E and SP-2 to the south, and R-5-E to the west. The campus is also adjacent to the Foggy Bottom Historic District, located west of New Hampshire Avenue and zoned FB/R-3.

4. The University, which has been located at the Foggy Bottom campus for almost 90 years, currently owns approximately 85 percent of the area and has a stated goal to acquire all of the property within the campus boundary. The University also anticipates using property outside the campus plan boundaries for uses permitted as a matter of right under applicable zoning regulations. No changes to the existing campus plan boundaries are proposed in the 2000 campus plan.

5. The Applicant submitted a plan for developing the campus as a whole, showing the location, height, and bulk of all present and proposed improvements, as required by 11 DCMR § 210.4.

6. The proposed campus plan anticipates:

   (a) adding approximately 950,000 square feet of gross floor area, including 874,000 square feet within the residentially zoned area of the campus, to meet the need for new facilities;

   (b) a floor area ration (FAR) of 3.47, within the allowed maximum of 3.5 FAR;

(c) student headcount of 20,000 and corresponding full-time equivalent (FTE) count of 16,553;

(d) faculty headcount of 2,236 and corresponding FTE count of 1,550;

(e) staff headcount of 10,293 and corresponding FTE count of 9,000;

(f) maintenance and further development of the open space system and pedestrian network;

(g) mid-block crossings to reinforce the pedestrian network and provide a safer pedestrian environment;

(h) urban design enhancements to identify the campus perimeter;

(i) 2,700 to 3,240 off-street parking spaces; and

(j) encouragement of alternative modes of transportation by students, faculty, staff, and visitors to minimize campus traffic and the impact on neighborhood streets.

7. The Applicant met repeatedly with community representatives in 1999 to discuss campus plan issues, and also participated in discussions facilitated by the Office of Planning in March and April 2000. The University subsequently filed a new proposed campus plan in April 12, 2000 that amended the original filing by:

(a) identifying two sites on campus for the construction of new residence halls;

(b) stating a long-term goal of housing 80 percent of full-time undergraduate students in University-owned or -controlled housing;

(c) stating a commitment to a new communication process with the community, including regular quarterly meetings;

(d) proposing enhanced policies regarding the conduct of University students both on campus and within the larger community; and

(e) proposing an enhanced Transportation Management Plan to maximize the use of public transportation.

Exhibit No. 95 at 9.

8. The proposed 2000 campus plan anticipates the addition of less gross floor area than was approved in the 1985 campus plan (*see* BZA Order No. 14455) and does not propose any change in student, faculty, or staff headcounts or the FTE equivalents for students and faculty, while the proposed staff FTE represents a reduction from the 1985 plan.

9. The University estimates that 2,775 undergraduates are not housed in University housing. Of those, approximately 1,103, or 40 percent, live in Foggy Bottom (zip codes 20006 and 20037), 543 live elsewhere in the District of Columbia, 718 live in Virginia, and 411 live in Maryland. Exhibit No. 230 at 2.

10. The Applicant testified that the University will require all freshmen and sophomore students to live in on-campus housing by 2002, except for those who are commuters, are married, have children, or have disabilities or religious beliefs inconsistent with residence hall life.

11. The University proposed to provide housing by the end of 2005 for at least 70 percent of its full-time undergraduates in University-owned or -controlled housing, toward a long-term goal of housing 80 percent of full-time undergraduate students in

University-owned or -controlled housing. The Applicant stated that the percentage requirement would act as a "soft cap" on undergraduate students, since the "rough parity" between the number of beds and full-time undergraduates would limit increases in the number of undergraduates.

12. The Applicant's revised campus plan proposal provides for a total of 1,350 new beds on campus, subject in some cases to contingencies. The total stock of on-campus University beds would potentially increase by approximately 40 percent, from 3,519 to 4,869. The University proposed to provide additional on-campus housing on three sites:

    (a) 200 beds on Square 103;

    (b) 650 beds on Square 80, provided that the District of Columbia transfers property it owns on that site to the University for redevelopment including new space for the School Without Walls, or alternatively, approximately 288 beds if the property is not transferred; and

    (c) 500 beds on Square 54, provided that the University is able to secure approval of a planned unit development (PUD) and rezoning of the site to C-3-C, and provided that the University is able to secure the necessary permits.

    Transcript (Tr.), September 13, 2000 at 144.

13. The Applicant proposed to provide an additional 550 beds immediately off-campus within a designated Housing Opportunity Area; that is, approximately 200 beds on Square 122 and at least 350 beds on Square 43. The Applicant defined the proposed Housing Opportunity Area as: (a) all areas on campus, (b) existing off-campus residential facilities owned or controlled by the University as of November 8, 2000,

(c) properties located in Squares 43, 58, 81, and 122, and (d) property located outside the "Foggy Bottom Area," that is, the area bounded by 19th Street, E Street, Rock Creek Park, and Pennsylvania Avenue, N.W., not including the Housing Opportunity Area. Tr., September 13, 2000 at 146-147.

14. The University suggested that, as an incentive, any additional housing constructed on campus after approval of the campus plan should not count toward the maximum FAR limiting the bulk of all buildings on campus.

15. The University also pledged not to purchase residential facilities in Foggy Bottom (excluding certain areas) for dormitory use for a period of five years or until the 70 percent housing goal was reached. Exhibit No. 196

16. The Foggy Bottom campus is served by two Metrorail stations – the Foggy Bottom/GWU station on-campus at 23rd and I Streets, and the Farragut West station located near the campus at 18th and I Streets, N.W. – as well as three Metrobus routes. The University provides a shuttle service connecting the Foggy Bottom and Mount Vernon campuses and the satellite parking at the Kennedy Center.

17. The Applicant's proposed Transportation Management Plan is intended to further encourage the use of public transportation by students, faculty, staff, and visitors to the Foggy Bottom campus. The University established a target of 60 percent transit use by faculty and staff and a five percent target for carpooling and vanpooling.

18. The Zoning Administrator, by memorandum dated March 23, 2000, submitted the results of a count of parking spaces on the campus, reporting that the current parking inventory on campus is 2,632 spaces.

(*See* Exhibit No. 45.) The University proposed to increase the minimum parking inventory to 2,800 spaces. Exhibit No. 196.

19. The Board finds that parking spaces located outside that campus plan boundary should not be counted toward the campus parking inventory because the record reflects that the 150 spaces leased by the University at the Kennedy Center have not been well-utilized and thus do not satisfy the demand for parking on-campus. The Board also finds that 2,800 parking spaces on-campus will be sufficient to mitigate potential adverse impacts on neighboring property.

20. The Office of Planning (OP) submitted several reports on the Applicant's campus plan. OP opposed approval of the proposed campus plan as filed, but ultimately supported approval subject to conditions necessary to protect the neighborhoods surrounding the University. According to OP, the conditions of approval should be designed to (a) protect adjacent communities that absorb a disproportionate share of students, university facilities and related uses and activities, (b) ensure that the West End is included as an adjacent community in need of protection from future University expansion and student growth, (c) provide the University with the flexibility to determine sound strategies for encouraging students to look at housing options in other areas of the city or region, (d) allow the University to further its academic mission, and (e) incorporate an enforcement mechanism that would give the University adequate incentive to follow through on its commitments. Exhibit No. 239 at 5, 6.

21. For purposes of its reports, OP defined the Foggy Bottom Area – that is, the area where OP believed that the University should not acquire off-campus housing – as the area bounded by 19th Street, E

Street, Rock Creek Park, and N Street, N.W., except for property zoned C3 or C4, the campus plan area, and the Housing Opportunity Area. OP defined the Housing Opportunity Area as (a) existing University residential facilities, (b) properties currently owned by the University on Squares 43 and 122, and (c) any property located within the campus plan boundary. Exhibit No. 239 at 8.

22. In its April 21, 2000 report, OP indicated that the proposed campus plan had "many positive points" but two related issues concerning neighborhood impacts remained unresolved: (1) the physical expansion of the University beyond the campus plan boundary to meet student housing needs, and (2) the impact on nearby communities of students not in University-owned housing who put added pressure on the local housing market. Seeking to ensure that a policy of no or very limited impacts on the fragile Foggy Bottom and West End neighborhoods was reflected in the approved campus plan, OP identified five issues of concern:

    (a) Projected enrollment increases will inevitably put pressure on the neighborhoods surrounding the University, and the Applicant's guarantee to provide housing for 60 percent of undergraduates would not adequately mitigate the full impact of the pressure.

    (b) There is presently insufficient housing located inside the boundaries of the campus plan, new housing will be needed, and if the University continues to purchase land outside the campus plan boundaries and the number of students living in the small, constrained Foggy Bottom community continues to increase, the residential community will reach a "tipping point"

where the Foggy Bottom community simply transforms into a "University area."

(c) Information about the undergraduate population is critical to determining present and future impacts on the surrounding residential community.

(d) While the University provides significant economic benefits, there is concern about the trend of removing land from the tax rolls for university purposes.

(d) No agreement currently exists or is included in the proposed campus plan that would provide binding, verifiable assurances that expansion into the Foggy Bottom/West End community would not occur in the future.

Exhibit No. 138 2-3.

23. In its supplemental report submitted September 8, 2000, OP recommended denial of the proposed campus plan due to its nonconformity with the requirements of Section 210 of the Zoning Regulations. However, OP also proposed two sets of recommendations that, in its view, would bring the campus plan into conformity with Section 210. One approach, which OP initially designated its preferred recommendation, included (a) establishment of a baseline number of students in the Foggy Bottom Area, (b) requiring the University to establish a program that would maintain or lower that baseline number, (c) implementation of strict enforcement mechanisms to provide certainty for the community and motivation for the University in complying with its baseline obligations, and (d) requirements for construction of additional housing on Squares 54 and 80. OP testified that the preferred set of recommendations would solve cumulative student impacts in Foggy Bottom

while also discouraging the University from acquiring residential property for dormitory use. However, OP also noted that its preferred approach might require legislative action to avoid any possible violation of the District of Columbia Human Rights Act, D.C. Code § 1-2501, *et seq.* OP subsequently decided that the baseline approach would "introduce too much complexity" in the proceeding. Exhibit No. 90 at 2, 8-9; Exhibit No. 239 at 5-6.

24. OP's second set of recommendations was based on specific elements of the Applicant's proposal with modifications including (a) a requirement to provide one additional unit of housing for each additional full-time undergraduate student above the University's 1999-2000 enrollment figures, (b) building in an enforcement mechanism if the University fails to meet its commitments, and (c) restricting the University's request to develop off-campus housing on property in which the University owns an interest. Exhibit No. 90 at 2.

25. OP testified that the University's expansive definition of a "Housing Opportunity Area" rendered the campus plan boundaries "virtually meaningless" from the perspective of neighborhood preservation and enhancement. OP also objected to the Applicant's proposal to exclude the campus plan area from the definition of the Housing Opportunity Area, stating that the University must bear the burden of further expansion. *Id.* at 20.

26. According to OP, the Applicant's commitment to house 70 percent of its undergraduate students on campus by 2005 was "no real solution to the dangers posed to the further viability of the Foggy Bottom and West End neighborhoods." OP testified instead that any means used to protect the surrounding neighborhoods "must be based on the actual source of

threat to those neighborhoods: continuing University expansion without any concomitant increase in on-campus student housing." *Id.*

27. The Department of Public Works (DPW), in its report to the Board, concluded that one of the best and most effective ways to minimize traffic to and from the campus is to provide on-campus housing for students presently living off-campus. According to DPW, the second most effective way to decrease traffic volume to and from the campus is to encourage the use of the existing public transportation conveniently located throughout the campus. Exhibit No. 138, DPW Report, April 21, 2000 at 3.

28. DPW supported much of the Applicant's proposed Transportation Management Plan, including the expansion of the shuttle bus service between the Mount Vernon and Foggy Bottom campuses. However, DPW also recommended that the University should seek to increase the use of transit and bicycle by students, staff, and faculty commuting to and from the campus. *Id.*

29. The Board concurs with the findings and recommendations of DPW, and finds that the Applicant's proposed Transportation Management Program is adequate to address any potential adverse impacts associated with traffic.

30. ANC 2A recommended denial of the campus plan application. In its report, dated April 17, 2000, the ANC contends that the proposed campus plan "largely ignores the adverse impacts that the University has on surrounding neighborhoods. . . . " The ANC objects especially to the University's "failure to build sufficient dormitories to house its students within the campus plan boundaries and [its] concomitant practice of acquiring properties outside the

campus plan boundaries for student housing" as well as "the traffic and parking impacts that spill into the neighborhoods outside the campus plan boundaries." ANC Report at 2.

31. ANC 2A argues that housing large numbers of students is an institutional university use that is not compatible with a viable, permanent residential neighborhood, because student residents displace permanent residents, deplete available housing stock, erode the fabric of the neighborhood, and contribute little to the local tax base since their incomes are usually minimal and their legal residence is usually elsewhere. Accordingly, ANC 2A reiterated its "long-standing policy and goal" that the University should provide housing for all undergraduate students within the boundaries of the current campus plan to alleviate the deleterious effects of housing large numbers of students in the residential areas outside the campus boundaries. *Id.* at 3-4.

32. The ANC asserts that the University's designation of two small sites on campus for the construction of dormitories is not sufficient to alleviate the effects of housing large numbers of students outside the campus plan boundaries, particularly in light of the University's projected increase in student headcount by 3,000 over the current level. The ANC stated that additional sites within the campus plan boundaries should be designated for dormitories, naming Square 54, the north half of Square 103, the southwest quadrant of Square 79, and the southeast quadrant of Square 101. *Id.* at 8.

33. By resolution passed unanimously at its April 12, 2000 public meeting, ANC 2A contended that the University has heavily increased enrollment of full-time students without commensurate available dormitory space, creating "an environment where

students are forced to seek housing in the surrounding residential neighborhood, resulting in the displacement and flight of tax-paying residents." The ANC also objected to the University's purchase of properties outside the campus plan boundaries "without provision for review or regulation of its acquisitions." Finding the campus plan unacceptable as submitted, the ANC concluded that student enrollment should be curtailed "until adequate on-campus housing, parking and other facilities are made available and result in a quantifiable decrease in the number of students forced to live in the surrounding off campus residential neighborhood." Exhibit No. 113.

34. The Foggy Bottom Association (FBA) also urged the Board to deny the application, stating that the institutional policies of the Applicant have been very damaging to the Foggy Bottom/West End area over the term of the 1985 plan, and that the area would not survive as a residential community if the same policies are permitted in the future. According to the FBA, the core problem has two main causes: (1) the University has had no meaningful constraint on enrollment and (2) there has been no requirement to house added students on campus, and the University has largely not done so. The FBA testified that, as a result, student renters have "flooded the private market, turning apartment houses into *de facto* dorms and row houses into informal frat houses," and the University has bought about three dozen properties outside the campus plan boundaries but within Foggy Bottom/West End, mostly to house students.

35. The FAB testified that the applicant's housing proposals "are completely inadequate," particularly because an undifferentiated student cap of 20,000 does not guarantee against additional students living

in Foggy Bottom/West End, and because the applicant made no unconditional commitment to add any on-campus dormitory rooms. *Id.* at 5.

36. The Board received numerous letters in support of the Application. The letters generally cited the important role of the University in the District's economy, its commitment to the Foggy Bottom neighborhood, and contributions made by the University and its students and faculty, for example, in serving as volunteers and providing assistance to local businesses, churches, and neighborhood groups. Other letters in support, written by residents at Foggy Bottom, described advantages of living near the University, including landscaping and other open space improvements, opportunities to audit classes and use the University library, and the proximity to students who enliven the neighborhood.

37. The Board also received numerous letters in opposition to the proposed campus plan. Many residents of Foggy Bottom expressed concern about the University's continued expansion into the residential neighborhood. Other letters cited concerns relating to traffic and insufficient parking in the surrounding neighborhood associated with the University. Opponents of the proposed campus plan generally stated that the Applicant should not be permitted to increase its undergraduate enrollment, because the University's expansion off-campus has displaced taxpaying residents, jeopardized the residential character of the Foggy Bottom and West End neighborhoods, and harmed the District of Columbia by removing properties from the tax rolls.

38. The Board gives great weight to the testimony of the Office of Planning and the affected ANC and finds that the number of students at the Foggy Bottom

> campus is having an adverse impact on the surrounding neighborhoods because of the displacement of permanent, non-student housing as a result of the lack of sufficient on-campus housing and the University's acquisition of property off-campus to increase the supply of dormitory beds.

CONCLUSIONS OF LAW AND OPINION:

The Applicant is seeking a special exception, pursuant to Sections 210 and 3104 of the Zoning Regulations, for approval of an updated campus plan for a period of 10 years. The Board is authorized to grant a special exception where, in the judgment of the Board based on a showing through substantial evidence, the special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps. D.C. Code § 5-242(g)(2), 11 DCMR § 3104.1.

The Zoning Regulations specify that use as a university in a residential zone shall be located so that it is not likely to become objectionable to neighboring property because of noise, traffic, number of students, or other objectionable conditions. 11 DCMR § 210.2. In reviewing and deciding a campus plan application, the Board must consider relevant policies of the District Elements of the Comprehensive Plan. 11 DCMR § 210.7. The Ward 2 element of the Comprehensive Plan provides that:

> George Washington University continues to expand its operations in the Foggy Bottom area. Therefore, the University must work closely with the Foggy Bottom community on developing a campus plan. The campus plan should include

> sufficient dormitory space for the student body on campus to alleviate some of the pressure on housing by students.

10 DCMR § 1327.1(b). The Comprehensive Plan also provides that:

> . . . The expansion of the University has resulted in the diminishment of housing and the construction of buildings for the University purposes. This and other commercial usage is of grave concern to the Foggy Bottom residential community. Intense student pressure on Foggy Bottom's housing stock outside the campus, combined with the impact of university generated traffic has had a negative effect on residential Foggy Bottom. The University must continue to construct student dormitories to alleviate the pressure on the housing stock outside the boundaries of the campus plan. The University must be sensitive to the surrounding residential neighborhood.

10 DCMR § 1358.1.

The Board concludes that the Applicant has met its burden of showing that the university use will not be objectionable to neighboring property. However, the Board concludes that it is necessary to condition its order to minimize any impacts from existing conditions and any potential impacts from planned future development.

The Zoning Regulations specify that the number of students is one factor that the Board must take into account when asserting whether a university use in a residential zone is likely to become objectionable to neighboring property. *See* 11 DCMR § 210.2. In this case, the Office of Planning, the affected ANC, and parties in opposition have asserted that the number of students using the Foggy

Bottom campus has become objectionable to the surrounding neighborhoods because of the lack of sufficient on-campus housing and because of the University's acquisition of property off-campus to increase the supply of dormitory beds. The Board concludes that both factors – the insufficient supply of on-campus housing and expansion of university use through off-campus acquisition – are likely to exacerbate objectionable impacts on neighboring property unless steps are taken to prevent that outcome. The Board notes especially the concerns of the Office of Planning about the continued viability of the Foggy Bottom and West End neighborhoods, as pressures associated with University expansion threaten their livability and residential character.

Therefore, the Board concludes that approval of the 2001 campus plan must be conditioned on measures that will allow the University to operate and improve its facilities without creating adverse impacts on neighboring property. For purposes of these conditions, the Board adopts the following definition of the Foggy Bottom/West End Area: the area bounded by E Street on the south, Rock Creek Park on the west, N Street on the north, and 19th Street on the east, excluding the campus plan area. The Foggy Bottom and West End neighborhoods are the communities immediately affected by the presence and impacts of the University.

As a condition of approval of the 2001 campus plan, the University must limit enrollment of full-time undergraduate students to that number enrolled as of February 13,

2001[1] ("benchmark enrollment") until the University has available on-campus student housing in an amount that will house 70 percent of its undergraduate population. Until the 70-percent target is reached, the University will not be granted a special exception for any non-residential use on campus. Once the University is able to offer on-campus housing to at least 70 percent of full-time undergraduates, enrollment may be increased only if additional on-campus student housing is available for each additional undergraduate student to be enrolled.

The 70-percent on-campus housing condition is intended to provide the impetus for the Applicant to encourage more undergraduates to live within the boundaries of the campus plan and to discourage the University from seeking to acquire additional property outside the campus plan boundaries in the surrounding neighborhoods for undergraduate student housing. This condition is a performance standard that gives the University significant flexibility in deciding how to use its property within the campus plan boundaries, rather than mandating the development of dormitories in certain locations on campus.

The performance standard approach is somewhat similar to the "preferred recommendation" that OP originally proposed but later withdrew in light of its complexity. Both measures are intended to increase the undergraduate population living within the area defined by the

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[1] February 13, 2001 was the date on which the Board voted to approve this application at a public meeting. This condition and all other set forth in this Order were specifically approved.

campus plan boundaries, and thereby minimize the adverse impacts on surrounding neighborhoods associated with numbers of students living there and the potential for University expansion by acquiring property outside the campus plan boundaries. The 70-percent on-campus condition eliminates much of the complexity inherent in OP's recommendation, which would have required a determination of the number of students living off-campus in Foggy Bottom. Instead, any future increases in enrollment will be tied to the on-campus undergraduate population as a percentage of total full-time undergraduate enrollment, which should not be unduly difficult for the University to calculate.

The Board concludes that the issues and concerns of OP and ANC 2A are adequately addressed by the 70-percent undergraduate on-campus housing condition, which requires future University growth to occur in conjunction with future increases in on-campus housing, thereby minimizing the incentive to acquire additional properties outside the campus plan boundary and decreasing the threat of creating additional pressures on the permanent housing stock in the Foggy Bottom/West End Area. The University's implementation of a new housing program to encourage those students not living on campus to find housing outside the Foggy Bottom/West End Area will also reduce the impact of students there, as will the condition proposed by the Applicant that all freshmen and sophomores be required to reside on campus.

The Board concludes that the boundaries of the campus plan area should be revised to reflect more accurately those areas where the University already owns and plans to develop University residential facilities. Accordingly, the southern portion of the campus plan boundary should

be redrawn to encompass certain University-owned properties located outside of and adjacent to the southern boundary as previously drawn. The campus plan boundary shall be redrawn to include within it the Dakota at 2100 F Street in Square 81; 2201 Virginia Avenue (Riverside Towers), addresses 518 through 526 22nd Street, in Square 58; addresses 2006 and 2008 F Street in Square 58; and the University-owned property in Square 43. Especially in light of the University's plans to develop housing on property it owns in its proposed Housing Opportunity Area, the Board notes that inclusion of portions of certain squares immediately adjacent to the southern edge of the previous campus plan boundary will assist the University in meeting the 70 percent on-campus housing requirement. The previous campus plan boundary is otherwise unchanged.

The campus plan boundaries were redrawn in 1988 to exclude Square 43 on the basis of the Board's belief that "the removal of Square 43 [is] essential to the preservation and enhancement of residential uses in the Foggy Bottom neighborhood." BZA Order No. 14455 at 34. In that case, the Office of Planning testified in favor of excluding Square 43 from the campus plan area because implementation of the University's policy to acquire all property within its boundaries created a need to protect residential uses within the boundary from elimination. *Id.* at 16. In light of the University's plans to develop additional housing on the property it owns there, the Board now concludes that the Applicant's use of Square 43 is essentially a university use and that the square should be included within the boundaries of the campus plan.

The Applicant proposed, and OP concurred, that to encourage construction of on-campus dormitories, any

additional housing constructed on-campus after approval of the campus plan should not count toward the maximum FAR limiting the bulk of all buildings on campus. The Board cannot approve this recommendation because it would have the effect of increasing the FAR cap for the campus – something only the Zoning Commission can do by means of an amendment to the Zoning Regulations or through the PUD process. *See* 11 DCMR § 402.4.

The Board accorded the issues and concerns of ANC 2A the great weight to which they are entitled. In doing so, the Board fully credited the unique vantage point that the ANC holds with respect to the impact of the University and its proposed campus plan on their constituents. The ANC adopted a resolution stating that the proposed campus plan should not be approved and describing adverse impacts the ANC believes the University has on the Foggy Bottom/West End neighborhoods. The Board concludes that conditional approval of the campus plan adequately addresses the issues and concerns of the ANC and will minimize the potential adverse impact of the University on surrounding residential neighborhoods.

The Board notes that the ANC and other community representatives testified that the University's acquisition of properties outside the approved campus plan boundary should be restricted. However, as the Board has previously concluded, "the reach of § 210 does not extend beyond a campus to a use otherwise permitted." BZA Order No. 16507 at 7. That is, the Zoning Regulations do not prevent the University from acquiring and using property anywhere outside the campus plan boundaries so long as that use is consistent with all applicable zoning restrictions, including matter-of-right uses. *See also Spring Valley*

Wesley Heights Citizens Ass'n v. District of Columbia Board of Zoning Adjustment, 644 A.2d 434 (1994).

Accordingly, it is **ORDERED** that the application is **GRANTED SUBJECT** to the following **CONDITIONS**. For the purpose of these conditions, the term "campus plan boundary" means the campus plan boundary established by the Board in Condition No. 2. The term "Foggy Bottom/West End Area" means that area bounded by 19th Street, E Street, Rock Creek Park, and N Street, N.W., excluding the campus plan area.

1. The Applicant's proposed campus plan is approved until June 30, 2009, subject to the following conditions intended to mitigate those adverse impacts identified in this Order and any adverse impacts potentially arising from the location of a university use in a residentially zoned district, or until such time prior to June 30, 2009 as the Zoning Commission determines that conditions warrant submission of an updated campus plan.

2. The campus boundary as depicted in the plan offered by the Applicant is modified and expanded to encompass certain University-owned properties located outside of and adjacent to the southern boundary as previously drawn. The campus plan boundary shall be redrawn to include within it the Dakota at 2100 F Street in Square 81; 2201 Virginia Avenue (Riverside Towers), addresses 518 through 526 22nd Street, in Square 58; addresses 2006 and 2008 F Street in Square 58; and the University-owned property in Square 43.

3. The University shall work with community representatives to form an Advisory Committee for the purpose of fostering consistent communication between the University and the Foggy Bottom/West End

community, discussing issues of mutual interest and proposing solutions to problems that exist or arise in implementing the approved campus plan. It is recommended that the Advisory Committee consist of 10 members: five members to be selected by the University and five members chosen by ANC 2A, the Foggy Bottom Association, and the West End Citizens Association. The Advisory Committee should schedule quarterly meetings open to the public, and should keep minutes of each meeting. Upon request, the University will provide timely data relevant to campus plan issues to the Advisory Committee, provided that the data is not confidential or overly burdensome to produce. Decisions regarding the operation of the Committee should be made jointly by the University and the community.

4. The University shall notify the Office of Planning, ANC 2A, and the Advisory Committee of its development plans for a specific site on campus following approval of the proposal by appropriate University committees and the University's Board of Trustees and prior to preparation of final, detailed plans and specifications.

5. The University shall incorporate the following land-use policy into the 2001 Campus Plan: University uses and structures (including the location of any means of approach to and egress from the structure) will be located to avoid adverse impacts on non-University properties, especially those residential properties on the periphery of the campus.

6. The University shall incorporate the following design policy into the 2001 Campus Plan: The height, bulk, and design (including the location of any means of approach and egress) of future University structures will be compatible with and sensitive to the height,

bulk, and design of adjacent non-University-owned structures.

7. The University shall prepare a detailed streetscape plan applicable to the entire campus. The plan shall include, among other elements, a discussion of the installation of sign pylons, and it shall be developed in conjunction with the Office of Planning, the Department of Public Works, and the Advisory Committee. Upon completion, the plan shall be submitted to the Board for review.

8. Student enrollment (headcount) over the life of the plan shall not exceed 20,000 students and the student full-time equivalent shall not exceed 16,553. The number of full-time equivalent faculty and staff shall not exceed 1,550 and 9,000 respectively, while the headcounts for faculty and staff shall not exceed 2,236 and 10,293 respectively.

9. The University's undergraduate population shall be capped at the number of full-time students enrolled as of February 13, 2001 ("benchmark enrollment").[2] The cap will remain in place, and only applications for residential special exceptions may be processed, until the University has available on-campus student housing in an amount that will house 70 percent of its undergraduate population. For purposes of this condition, a special exception requested for an on-campus mixed-use project that includes residential use will be considered residential if the residential use occupies at least 50 percent of the FAR of the proposed project (exclusive of unoccupied roof

[2] February 13, 2001 was the date on which the Board voted to approve this application at a public meeting. This condition and all other set forth in this Order were specifically approved.

structures). Once the Zoning Administrator certifies to the Office of Zoning that this level of on-campus housing has been achieved, (1) the University may increase enrollment only if additional on-campus student housing is available for each additional undergraduate student to be enrolled, and (2) applications for special exceptions for both residential and non-residential projects may be processed. For purposes of this condition, the term "full-time undergraduate student" does not include part-time or evening students, students who are married or have children, students with disabilities or religious beliefs inconsistent with residence hall life, or students who commute from outside the District of Columbia.

10. Commencing in the Fall 2001 semester, the University shall require all full-time freshmen and sophomore students to reside in University housing located within the campus boundary established by the Board, to the extent that such housing is available. The University may exempt students who commute, are married or have children, or have disabilities or religious beliefs inconsistent with residence hall life. Prior to the Fall 2003 semester, housing commitments made to current University students may be taken into account when determining the amount of housing available.

11. The University shall institute a program to provide its students who are eligible to live off-campus with information about housing opportunities outside the Foggy Bottom/West End Area. The University shall provide this information using local licensed brokers or apartment locators as appropriate, and shall also provide information on the availability, reliability, and accessibility of public transportation between the campus and the housing opportunities. For those locations that are not Metro accessible, the University shall explore the use of a shuttle bus service to its

campus for areas that the University determines contain a critical mass of University students, and shall report its criteria and findings to the Advisory Committee annually, at the beginning of each Fall semester.

12. The University shall expand the use of disciplinary interventions to acts of misconduct by students living off-campus in the Foggy Bottom/West End Area, even if the students are not in properties owned or controlled by the University. The University shall act on incident reports by residents, the ANC, community associations, building management, building association boards, University security officers, and police. The University shall develop an outreach program with neighboring apartment buildings to educate management companies and tenant associations on the University's disciplinary program and its reporting requirements to facilitate effective use of its program. Additionally, subject to applicable law, the University shall permit management companies to obtain University clearances for student applicants for apartments to prevent students who are not eligible for the University's on-campus housing due to conduct violations from obtaining units in neighboring apartments.

13. The University shall maintain and publicize a hotline line available 24 hours per day, seven days per week to receive calls about student conduct issues and safety and security concerns. The University shall maintain a log of all calls received and all actions taken, including all referrals made. The University shall maintain its Crimes Tips Hotline (presently 994-TIPS), where calls can be made anonymously to a recorded "tip" line. Calls needing a more immediate response shall be directed to the University police (presently 994-6110) 24 hours per day, seven days per week. The University police will aid off-campus

complainants in obtaining assistance from the Metropolitan Police Department. Reports of improper off-campus student conduct will also be referred to the appropriate University departments for their attention.

14. The University shall promptly establish a mandatory program for its students that will address "good neighbor" issues, educating students about appropriate conduct in the off-campus community.

15. The University shall implement measures to minimize adverse impacts associated with parking and traffic.

    a. *Support of Mass Transit*: The University shall institute the Metrochek program offered by the Washington Metropolitan Area Transit Authority (WMATA) to allow employees to pay for public transportation costs on a pre-tax basis, with a target date for implementation of Spring 2001. In an effort to increase Metro ridership among the student population, the University shall implement an introduction to public transportation program for incoming students that includes provision of WMATA's "SmarTrip" cards to incoming students as of the Fall 2001 new student orientation. The University will work with Metro to schedule a future SmarTrip "carding event" starting in Fall 2001 at various locations around campus to provide additional information about public transportation to the University community.

    b. *Parking*: The University shall provide at least 2,800 off-street parking spaces within the campus boundary. Any off-street parking obtained by the University at a location outside the campus plan boundaries, including the University's

off-campus spaces located at the Kennedy Center, shall not be counted toward the 2,800 minimum for purposes of satisfying this condition. The number of off-street parking spaces required to be provided within the campus boundary may be increased in any subsequent special exception order issued pursuant to this plan if necessary to mitigate the adverse impact of the approved uses on parking. The University shall monitor its utilization of University parking lots to determine usage patterns and to conduct an ongoing assessment of parking needs.

c. *Community Parking Program*: In addition to its on-campus parking inventory, the University maintains parking facilities in certain off-campus properties. Members of the Foggy Bottom community have expressed an interest in exploring the creation of a parking program pursuant to which non-student residents of the Foggy Bottom community would be permitted to park in University properties. The University shall provide contracts for parking to residents of the Foggy Bottom/West End Area on a space-available basis. The location of such spaces will be determined by the University. Levels of and changes in availability will be reported to the Advisory Committee on request.

d. *Notice*: The University shall notify all affected property owners or occupants in a timely manner of the occurrence of any temporary street closing necessary to accommodate University-related functions.

e. *Student vehicles*: The Applicant, through its Office of the Registrar, shall maintain an accurate record of the license plate numbers of motor vehicles kept by students, updated annually at the

beginning of the Fall semester. The Applicant shall direct the students to register their vehicles in the District of Columbia, or obtain a reciprocity sticker, and shall consult with the D.C. Department of Motor Vehicles to determine whether such registration is completed or such stickers are obtained. The Applicant shall withhold parking privileges to students who do not comply with D.C. registration or reciprocity requirements. Failure to register student vehicles in the District or to obtain reciprocity stickers shall constitute a violation of the Code of Student Conduct.

16. Within six months of the effective date of this Order, the University shall prepare an updated comprehensive management plan to address traffic and parking associated with attendance at events on campus that are attended by a significant number of persons not normally associated with the University and the campus, who come to the campus for the specific purpose of attending the event. The management plan shall be maintained by the University, made available to the public, and submitted to the Advisory Committee, and shall include the following:

    a. Measures to schedule events at times that reduce conflicts with other traffic and other demands for parking.

    b. Measures to discourage travel by private automobile and encourage travel by public transportation.

    c. Measures to encourage persons who drive to park in commercial or University parking garages.

    d. Any other specific measures to address parking demand and decrease vehicular traffic in the surrounding Foggy Bottom/West End Area.

17. Starting in the Fall 2001 registration process, the University shall gather information about the local addresses of the full-time undergraduate population. The University shall update the information annually. The University shall annually provide the Advisory Committee with an audited count of the number of full-time undergraduate students residing in the Foggy Bottom/West End Area outside the campus plan boundaries, and shall include the information in each application for a special exception pursuant to the approved 2001 Campus Plan.

18. Within 90 days of the effective date of this Order, the University shall revise the Campus Plan to reflect changes mandated by the above-stated conditions. The revision shall include a revised map of the campus, with the following specifications: The map shall show the campus boundaries and the number of each square within the boundary, and shall identify the approved uses for each square; the map shall be legible and not require color for graphic clarity. Upon completion, the revised copy shall be submitted to the Board. The Board shall certify the revised copy as the approved campus plan. Copies of the approved plan shall be maintained in the Office of Zoning and the Office of the Zoning Administrator.

19. The University shall submit a special exception application to the Board for each structure or addition to an existing structure that the University proposes to construct over the life of the Plan. In addition to a demonstration of compliance with applicable provisions of the zoning regulations and the contents of the approved 2001 Campus Plan, each application shall include the following:

    a. A showing that the use, height, bulk, and design (including the location of any means of approach and egress) of the proposed structure is sensitive

to and compatible with adjacent and nearby non-University-owned structures and uses;

b. An indication of any need for, amount of, and proposed locations of interim leased space necessary to accommodate housing and/or activities displaced by construction, and/or activities intended to be located permanently in the completed structure;

c. Recomputation of the University's total FAR, copies of which shall be submitted to the Office of Zoning and the Zoning Administrator. Such information shall be broken down by zone district and include the following: existing and occupied FAR; FAR under construction pursuant to Board approval; and FAR upon completion of the proposed structure;

d. An updated student enrollment headcount indicating actual enrollment of full-time undergraduate students, as of 30 days prior to the application date, and the number of percentage of full-time undergraduate students housed on campus, including documentation and an explanation of the methods and assumptions used in the calculation;

e. The most recent audited count of full-time undergraduate students residing in the Foggy Bottom/West End Area outside of the campus plan boundaries;

f. A progress report on the implementation of the streetscape plan required by Condition No. 7;

g. The number of off-street parking spaces within campus boundaries, as of 30 days prior to the application date, including documentation and

an explanation of the methods and assumptions used in the calculations; and

h. A status report on the Transportation Management Program.

20. No special exception application filed by the University for further processing under this plan may be granted unless the University proves that it has consistently remained in substantial compliance with Conditions 1 through 19 set forth in this Order. Further, any violation of a condition of this Order shall be grounds for the denial or revocation of any building permit or certificate of occupancy applied for by, or issued to, the University for any University building or use approved under this plan, and may result in the imposition of fines and penalties pursuant to the Civil Enforcement Act, D.C. Code §§ 6-2701 to 6-2723.

VOTE: 4-0-1 (Robert N. Sockwell, Anne M. Renshaw, and Carol J. Mitten to grant; Sheila Cross Reid to grant and concurring in all conditions except Conditions No. 9; Rodney Moulden not present, not voting.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved issuance of this Order.

ATTESTED BY: /s/ Jerrily R. Kress
JERRILY R. KRESS, FAIA
Director

Final Date of Order: MAR 29 2001

PURSUANT TO 11 DCMR §3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE 10 DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 DCMR § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

THE APPLICANT SHALL COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, CODIFIED AS CHAPTER 25 IN TITLE 1 OF THE D.C. CODE. *SEE* D.C. CODE § 1-2531 (1999). THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THE HUMAN RIGHTS ACT. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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BZA APPLICATION NO. 16553

As Director of the Office of Zoning, I hereby certify and attest that on MAR 29 2001, a copy of the foregoing Decision and Order in BZA Application 16553 was mailed first class, postage prepaid, to each party and public agency who appeared and participated in the public hearing concerning this matter, and who is listed below:

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Attested by: /s/ Jerrily R. Kress
JERRILY R. KRESS, FAIA
Director

APPENDIX F

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-7055 **September Term, 2002**
01cv00895

Filed On:
(Filed Mar. 18, 2003)

George Washington University,
a Federally Chartered
University,

Appellee

v.

District of Columbia,
a Municipal Corporation, et al.,

Appellants

Consolidated with 02-7060

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel,* and Gardland,* Circuit Judges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellee/cross-appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

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* Circuit Judges Tatel and Garland did not participate in this matter.

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Deputy Clerk

APPENDIX G

CONSTITUTION OF THE UNITED STATES

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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42 U.S.C.A. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District

of Columbia shall be considered to be a statute of the District of Columbia.

DISTRICT OF COLUMBIA OFFICIAL CODE 2001 EDITION DIVISION I. GOVERNMENT OF DISTRICT. TITLE 2. GOVERNMENT ADMINISTRATION. CHAPTER 14. HUMAN RIGHTS. UNIT A. HUMAN RIGHTS LAW. SUBCHAPTER I. GENERAL PROVISIONS.

§ 2-1401.01. Intent of Council.

It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business.

SUBCHAPTER II. PROHIBITED ACTS OF DISCRIMINATION. PART C. HOUSING AND COMMERCIAL SPACE.

§ 2-1402.21. Prohibitions.

(a) *General.* – It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based on the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual:

(1) To interrupt or terminate, or refuse or fail to initiate or conduct any transaction in real property; or to require different terms for such transaction; or to represent falsely that an interest in real property is not available for transaction;

(2) To include in the terms or conditions of a transaction in real property, any clause, condition or restriction;

(3) To appraise a property, refuse to lend money, guarantee a loan, purchase a loan, accept residential real property as security for a loan, accept a deed of trust or mortgage, or otherwise refuse to make funds available for the purchase, acquisition, construction, alteration, rehabilitation, repair or maintenance of real property; or impose different conditions on such financing; or refuse to provide title or other insurance relating to the ownership or use of any interest in real property;

(4) To refuse or restrict facilities, services, repairs or improvements for a tenant or lessee;

(5) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to a transaction, or proposed transaction, in real property, or financing relating thereto, which notice, statement, or advertisement unlawfully indicates or attempts unlawfully to indicate any preference, limitation, or discrimination based on race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or business, of any individual;

(6) To discriminate in any financial transaction involving real property, on account of the location of residence or business (i.e. to "red-line"); or

(7) To limit access to, or membership or participation in any multiple- listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting residential real estate, or to discriminate against any person in terms or conditions of access, membership or participation in any organization, service or facility.

(b) *Subterfuge.* – It shall further be unlawful discriminatory practice to do any of the above said acts for any reason that would not have been asserted but for, wholly or partially, a discriminatory reason based on the actual or perceived: race, color, religion, national origin, sex, sexual orientation, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual.

(c) *Families with children.* – (1) It shall be an unlawful discriminatory practice to do any of the acts prohibited in subsections (a) and (b) of this section wholly or partially based on the fact that a person has one or more children who reside with that person.

(2) There shall be a rebuttable presumption that an unlawful discriminatory practice has occurred if the person alleging discrimination has 1 or more children who reside with that person and any of the acts prohibited by subsections (a) and (b) of this section are done to maintain residential occupancies more restrictive than the following:

(A) In an efficiency apartment, 2 persons; or

(b) In an apartment with one or more bedrooms, 2 times the number of bedrooms plus one.

(3) Nothing contained in this chapter limits the applicability of any District or federal restriction regarding the maximum number of occupants permitted to occupy a dwelling. Nothing in this chapter regarding familial status applies to housing for older persons.

(4) For the purposes of this subsection "housing for older persons" means a premises which:

(A) The U.S. Department of Housing and Urban Development determines pursuant to a federal program, is specifically designed and operated to assist older persons;

(B) Is intended for, and solely occupied by persons 62 years of age or older; or

(C) Is intended and operated for occupancy by persons 55 years of age or older, provided that at lest 80% of the occupied units are occupied by at least one person who is 55 years of age or older, and the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required pursuant to this paragraph, and complies with rules issued by the Secretary of the U.S. Department of Housing and Urban Development for verification of occupancy.

(d) *Disability.* – (1) It shall be an unlawful discriminatory practice in the sale or rental of real estate to deny a dwelling to a buyer or renter or to otherwise make a dwelling unavailable to a buyer or renter because of a disability of:

(A) That buyer or renter; or

(B) Any person residing in or intending to reside in that dwelling after it is sold, rented or made available; or any person associated with that buyer or renter.

(2) It shall be unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection with the dwelling because of a disability of:

(A) That buyer or renter: or

(B) Any person residing in or intending to reside in that dwelling after it is sold, rented or made available; or any person associated with that buyer or renter.

(3) For purposes of this subsection, "unlawful discrimination" includes:

(A) A refusal to permit, at the expense of the person with the disability, reasonable modifications of existing premises occupied or to be occupied by the person if the modification may be necessary to afford the person full enjoyment of the premises of a dwelling. A landlord, where it is reasonable, may condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted;

(B) A refusal to make reasonable accommodations in rules, policies, practices, or services, when these accommodations may be necessary to afford any person equal opportunity to use and enjoy a dwelling;

(C) In connection with the design and construction of covered multifamily dwellings for first occupancy after April 20, 1999, a failure to design and construct these dwellings in a manner that:

(i) The public and common use portions of the dwellings are readily accessible to and usable by disabled persons; and

(ii) Doors designed to allow passage into and within all premises within the dwellings are sufficiently wide to allow passage by persons with wheelchairs;

(D) All premises within the dwellings shall contain the following features of adaptive design:

(i) An accessible route into and through the dwelling;

(ii) Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(iii) Reinforcements in bathroom walls to allow later installations of grab bars;

(iv) Usable kitchens and bathrooms so that an individual in a wheelchair can maneuver about the space; and

(v) The premises within the dwellings shall have at least 1 building entrance on an accessible route unless it is impracticable because of the terrain or unusual characteristics of the site.

(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for disabled persons suffices to satisfy the requirements of paragraph (3) of this subsection.

(5) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

DISTRICT OF COLUMBIA OFFICIAL CODE 2001 EDITION DIVISION I. GOVERNMENT OF DISTRICT. TITLE 6. HOUSING AND BUILDING RESTRICTIONS AND REGULATIONS. CHAPTER 6. ZONING AND HEIGHT OF BUILDINGS. SUBCHAPTER IV. ZONING REGULATIONS; BOARD OF ZONING ADJUSTMENT.

§ 6-641.02. Zoning regulations – Purpose.

Zoning maps and regulations, and amendments thereto, shall not be inconsistent with the comprehensive plan for the national capital, and zoning regulations shall be designed to lessen congestion in the street, to secure safety from fire, panic, and other dangers, to promote health and the general welfare, to provide adequate light and air, to prevent the undue concentration of population and the overcrowding of land, and to promote such distribution of population and of the uses of land as would tend to create conditions favorable to health, safety, transportation, prosperity, protection of property, civic activity, and recreational, educational, and cultural opportunities, and as would tend to further economy and efficiency in the supply of public services. Such regulations shall be made with reasonable consideration, among other things, of the character of the respective districts and their suitability for the uses provided in the regulations, and with a view to encouraging stability of districts and of land values therein.

CODE OF DISTRICT OF COLUMBIA MUNICIPAL REGULATIONS CDCR TITLE 11. ZONING ZONING COMMISSION OF THE DISTRICT OF COLUMBIA CHAPTER 2. R-1 RESIDENCE DISTRICT USE REGULATIONS

210. COLLEGES AND UNIVERSITIES (R-1)

210.1 Use as a college or university that is an academic institution of higher learning, including a college or university hospital, dormitory, fraternity, or sorority house proposed to be located on the campus of a college or university, shall be permitted as a special exception in an R-1 District if approved by the Zoning Commission under §3104, subject to the provisions of this section.

210.2 Use as a college or university shall be located so that it is not likely to become objectionable to neighboring property because of noise, traffic, number of students, or other objectionable conditions.

210.3. In R-1, R-2, R-3, R-4, R-5-A, and R-5-B Districts, the maximum bulk requirements normally applicable in the districts may be increased for specific buildings or structures; Provided, that the total bulk of all buildings and structures on the campus shall not exceed the gross floor area prescribed for the R-5-B District. In all other Residence Districts, similar bulk increases may also be permitted; Provided, that the total bulk of all buildings and structures on the campus shall not exceed the gross floor area prescribed for the R-5-D District. Because of permissive increases as applicable to normal bulk requirements in the low-density districts regulated by this title, it is the intent of this subsection to prevent unreasonable campus expansion into improved low-density districts.

210.4 As a prerequisite to requesting a special exception for each college or university use, the applicant shall have submitted to the Commission for its approval a plan for developing the campus as a whole, showing the location, height, and bulk, where appropriate, for all present and proposed improvements, including but not limited to the following:

(a) Buildings and parking and loading facilities;

(b) Screening, signs, streets, and public utility functions;

(c) Athletic and other recreational facilities; and

(d) A description of all activities conducted or to be conducted on the campus, and of the capacity of all present and proposed campus development.

210.5 Within a reasonable distance of the college or university campus, and subject to compliance with §210.2, the Commission may also permit the interim use of land or improved property with any use that the Commission may determine is a proper college or university function.

210.6 When a major new building that has been proposed in a campus plan is instead moved off-campus, the previously designated site shall not be designated for or devoted to a different major new building until and unless the Commission has approved an amendment to the campus plan applicable to the site; Provided, that for this purpose, a major new building is defined as one specifically identified in the campus plan.

210.7 In reviewing and deciding a campus plan application or new building construction pursuant to a campus plan, the Commission shall consider, to the extent they are

relevant, the policies of the District Elements of the Comprehensive Plan.

210.8 As an integral part of the application requesting approval of new building construction pursuant to a campus plan, the college or university shall certify and document that the proposed building or amendment is within the floor area ratio (FAR) limit for the campus as a whole, based upon the computation included in the most recently approved campus plan and the FARs of any other buildings constructed or demolished since the campus plan was approved.

210.9 Before taking final action on an application for use as a college or university, the Commission shall submit the application to the D.C. Office of Planning and the D.C. Department of Public Works for review and written reports.

CHAPTER 3. R-2, R-3, R-4, AND R-5 DISTRICT USE REGULATIONS

330. R-4 DISTRICTS: GENERAL PROVISIONS

330.1 The R-4 district is designed to include those areas now developed primarily with row dwellings, but within which there have been a substantial number of conversions of the dwellings into dwellings for two (2) or more families.

330.2 Very little vacant land shall be included within the R-4 district, since its primary purpose shall be the stabilization of remaining one-family dwellings.

330.3 The R-4 district shall not be an apartment house district as contemplated under the General Residence (R-5) districts, since the conversion of existing structures shall be controlled by a minimum lot area per family requirement.

330.4 Except as provided in chapters 20 through 25 of this title, in an R-4 district, no building or premises shall be used and no building shall be erected or altered that is arranged, intended, or designed to be used except for one (1) or more of the uses listed in §§330 through 349.

330.5 The following uses shall be permitted as a matter of right in an R-4 district:

(a) Any use permitted in R-3 districts under §320.3 of this chapter;

(b) Flat;

(c) The conversion of a building or other structure existing before May 12, 1958, to an apartment house as limited by §§350.4 (c) and 401.3;

(d) Child/Elderly development center; provided that the center shall be limited to no more than sixteen (16) individuals;

(e) Child/Elderly development center located in a building that was built as a church and that has been used continuously as a church since it was built; Provided, that all of the play space required for the center by the licensing regulations shall be located on the same lot on which the center is located;

(f) Hospital, sanitarium, or clinic for humans;

(g) Private Club, lodge, fraternity house, sorority house, or dormitory, except when the use is a service customarily carried on as a business; and

(h) Museum;

(i) Community based residential facility; Provided that notwithstanding any provision in this title to the contrary, the Zoning Administrator has determined that such community based facility, which otherwise complies with the zoning requirements of this title that are of general and uniform applicability to all matter of right uses in an R-4 District, is intended to be operated as housing for persons with handicaps. For purposes of this subsection, a "handicap" means, with respect to a person, a physical or mental impairment which substantially limits one or more of such person's major life activities, or a record of having, or being regarded as having, such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance.

330.6 A rooming or boarding house shall be permitted as a matter-of-right in an R-4 District; Provided, that the following requirements are met;

(a) Accommodations are not provided to transient guests who stay ninety (90) days or less at the premises, or guests whose occupancies would be subject to the tax imposed by the District of Columbia Hotel Occupancy and Surtax on Corporations and Unincorporated Business Tax Act of 1977;

(b) No sign is displayed on the premises;

(c) No advertisement is displayed or published on or off the premises holding out the establishment to be a hotel,

motel, inn, hostel, bed and breakfast, private club, tourist home, guest house, or other transient accommodation;

(d) Cooking facilities are not provided in any individual unit; and

(e) In a rooming house, no central dining or food preparation area is provided for guests.

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350. R-5 DISTRICTS: GENERAL PROVISIONS

350.1 The R-5 districts are designed to permit a flexibility of design by permitting in a single district, except as provided in §§350 through 360, all types of urban residential development if they conform to the height, density, and area requirements established for these districts under chapter 4 of this title. The R-5 districts shall also permit the construction of those institutional and semipublic buildings that would be compatible with adjoining residential uses and which are excluded from the more restrictive Residence districts.

350.2 The R-5 districts are subdivided into R-5-A, R-5-B, R-5-C, R-5-D and R-5-E districts. In R-5-A districts only a low height and density shall be permitted; in R-5-B a moderate height and density shall be permitted; in R-5-C a medium height and density shall be permitted; and in R-5-D and R-5-E districts are a relatively high height and density shall be permitted.

350.3 Except as provided in chapters 20 through 25 of this title, in any R-5 district, no buildings or premises shall be used and no building shall be erected or altered that is arranged, intended, or designed to be used except for one (1) or more of the uses listed in §§350 through 360.

350.4 The following uses shall be permitted as a matter of right in an R-5 district:

(a) Any use permitted in the R-4 district subject to the requirements of §410 of chapter 4 and §353 of chapter 3 of this title;

(b) Greenhouse or horticultural nursery;

(c) Multiple dwellings, subject to the requirements of §353 and §410 of this title; Provided, that in an apartment house, accommodations may be provided only to residents who stay at the premises a minimum of one month;

(d) Hotel, only in R-5-B, R-5-C, R-5-D, or R-5-E districts, in existence as of May 16, 1980, with a valid Certificate of Occupancy or a valid application for a building permit; Provided, that the gross floor area of the hotel may not be increased and the total area within the hotel devoted to function rooms, exhibit space, and commercial adjuncts may not be increased. An existing hotel may be repaired, renovated, remodeled, or structurally altered;

(e) Residence for teachers or staff of private schools;

(f) Youth residential care home, community residence facility or health care facility for seven (7) to fifteen (15) persons, not including resident supervisors or staff and their families; Provided, that there is no property containing an existing community-based residential facility for seven (7) or more persons in the same square and that there is no property containing an existing community-based residence facility for seven (7) or more persons within a radius of five hundred feet (500 ft.) from any portion of the subject property; and

(g) Child/Elderly development center in R-5-D and R-5-E districts; provided, that the center shall be limited to no more than twenty-five (25) individuals.

350.5 A parking garage on an alley lot so recorded on the records of the Surveyor, District of Columbia, or recorded on the records of the D.C. Department of Finance and Revenue, on or before November 1, 1957, shall be permitted as a matter of right in an R-5 district; Provided, that the following conditions shall be met:

(a) No part of the garage shall be located within seventh-five feet (75 ft.) of any building line; and

(b) Vehicular entrances and exits shall open directly onto an alley.

350.6 A chancery shall be permitted use in R-5-D or R-5-E districts, subject to disapproval by the Board of Zoning Adjustment in accordance with the requirements of chapter 10 of this title.

CHAPTER 5. SPECIAL PURPOSE DISTRICTS

501 USES AS A MATTER OF RIGHT (SP)

501.1 The following uses shall be permitted as a matter of right in an SP district:

(a) Any use permitted in any R-5 district under §§350.4 and 350.5, except a hotel;

(b) Private school, including kindergarten, elementary, secondary, trade, or any other school;

(c) Religious reading room;

(d) Community center building;

(e) Park, playground, swimming pool, or athletic field operated by a local community organization;

(f) Ticket office;

(g) Child/Elderly development center; and

(h) Art gallery.

501.2 An artist studio shall be permitted as a matter of right in an SP district, subject to the following criteria:

(a) All operations and storage of materials shall occur inside the building;

(b) Sales of art work produced by the occupants of the studio shall be permitted within the studio; and

(c) The artist may teach the art to one or more persons.

501.3 General office use, including chancery, shall be permitted in an SP District as a replacement for office use for international organization, non-profit organization, labor union, architect, dentist, doctor, engineer, lawyer or similar professional person existing and approved by the Board of Zoning Adjustment (BZA) or the Zoning Commission or authorized by a validly issued certificate of occupancy prior to (effective date of these amendments). (46 DCR 812, 1/29/99)

District of Columbia Register
June 3, 1994

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 94-132
May 19, 1994

SUBJECT: Application of the Human Rights Act to the Operations of All District Offices and Agencies

ORIGINATING AGENCY: Office of the Corporation Counsel

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422 of the District of Columbia Self-Government and Governmental Reorganization Act of 1973, D.C. Code § 1-242, and by section 303 of the Human Rights Act of 1977, D.C. Law 2-38, D.C. Code § 1-2543, it is hereby ORDERED that:

1. The Human Rights Act of 1977, D.C. Law 2-38, D.C. Code § 1-2501 *et seq.*, is a bedrock statement of the public policy of the District of Columbia government. The very first section of the Human Rights Act, D.C. Code § 1-2501, states the sweeping goal: "to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibility, matriculation, political affiliation, physical handicap, source of income, and place of residence or business."

2. Section 241 of the Human Rights Act, D.C. Code § 1-2519, makes it unlawful, wholly or partly for a discriminatory reason to deny to any person the full and equal enjoyment of the services, facilities, privileges, and advantages, of any place of public accommodation. Similarly, the act prohibits discrimination in employment, real estate transactions, blockbusting or steering, and educational institutions. *See* sections 211, 221, 222, and 241, D.C. Code §§ 1-2512, 1-2515, 1-2516, and 1-2520.

3. Offices and agencies of the District government are covered by the prohibitions of the Human Rights Act. There are no exceptions. *No* office or agency of the District government may engage in any prohibited activity, including denial of full and equal enjoyment of its services, facilities, privileges or advantages to any person in violation of the Human Rights Act.

4. Each office or agency must interpret the laws which it executes in light of the Human Rights Act, in order to give effect to the compelling interest expressed in that act: namely to end discrimination.

5. Under section 303 of the act, D.C. Code § 1-2543, when any complaints are filed against District government agencies alleging violations of the act, the Mayor or his or her designee are to finally determine such matters.

6. If offices or agencies of the District government are unable to resolve any future complaints against them that they have violated the act any way, including denial of full and equal enjoyment of their services, facilities, privileges or advantages to any persons in any class protected by the Human Rights Act, I shall continue to refer such complaints to the Human Rights Commission for resolution pursuant to the Human Rights Act.

7. This Order shall become effective immediately.

/s/ Sharon Pratt Kelly
SHARON PRATT KELLY
MAYOR

ATTEST: /s/ Stephanie Greene
STEPHANIE GREENE
SECRETARY OF THE DISTRICT
OF COLUMBIA

[LOGO]

GOVERNMENT OF THE DISTRICT OF COLUMBIA
COMMISSION ON HUMAN RIGHTS
ONE JUDICIARY SQUARE
441 FOURTH STREET, N.W.
SECOND FLOOR, NORTH
WASHINGTON, D.C. 20001
TELEPHONE (202) 727-0656
FAX (202) 727-3781

May 20, 1994

STATEMENT OF JAMES M. LOOTS, Chairperson, District of Columbia Commission on Human Rights, concerning Mayor's Order 94-132, dated May 19, 1994, concerning Application of the Human Rights Act to the Operations of All District Offices and Agencies:

"Mayor Kelly's executive order represents a bold and necessary clarification of the applicability of the Human Rights Act to the District's government agencies. The merits of each case are still going to need to be determined on an individual basis. But what she's done with this order is make it clear that the District government can lead the fight against discrimination not only by regulation and enforcement; but also by example."